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No.

Supreme Court, U.S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION;
JAMES J. JURA, as Administrator;
JOHN S. HERRINGTON, as Secretary of the;
Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA,
Respondents.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

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QUESTIONS PRESENTED

1. Whether the restrictions imposed by the Bonneville Power Administration ("BPA") on access to the Pacific Intertie so affect rates charged California for nonfirm energy as to require compliance with Section 7(k) of the Pacific Northwest Electric Power Planning and Conservation Act ("Pacific Northwest Act"), 16 U.S.C. § 839e(k).

2. Whether the restrictions imposed by the BPA on access to the Pacific Intertie constitute unlawful discrimination against electric utilities in California under Section 6 of the Pacific Northwest Consumer Power Preference Act ("Regional Preference Act"), 16 U.S.C. § 837e, and Section 6 of the Federal Columbia River Transmission System Act ("Transmission System Act"), 16 U.S.C. § 838d.

3. Whether the restrictions imposed by the BPA on access to the Pacific Intertie conflict with its responsibility to maintain competition to the maximum extent possible.

LIST OF PARTIES

The parties to the proceeding below were petitioners the California Public Utilities Commission ("CPUC") and the California Energy Resources Conservation and Development Commission ("CEC") and respondents the BPA, James J. Jura as Administrator of the BPA, John S. Herrington as Secretary of the United States Department of Energy, and the United States of America.

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Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA,
Respondents.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

The CPUC hereby petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 831 F.2d 1467 and reprinted in the Appendix (hereinafter "App.") at A1-28.

JURISDICTION

The Court of Appeals entered judgment on November 6, 1987. It denied timely petitions for rehearing on February 4, 1988, in an order reprinted in the Appendix at C1-25. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions relevant to the present proceeding are 16 U.S.C. §§ 825s, 832a(b), 832c(a), 837(c), 837a, 837e, 838(d), and 839e(k). Each of these provisions is set forth verbatim in the Appendix at K1-6.

STATEMENT OF THE CASE

1. Development of the Pacific Intertie

Longstanding interest in electrically interconnecting the Pacific Northwest with California culminated in 1964. That year the United States Department of the Interior submitted to Congress a plan for the design, construction, and use of such an interconnection. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Cong. & Ad. News at 3389. Under this plan, the federal government would construct and operate most of the project in the Pacific Northwest, and various public agencies and privately-owned utilities would be responsible for that portion to be built in Nevada and California. *Id.* at 3390. The essential elements of this plan were approved by Congress through passage of the Public Works Appropriations Act of 1964, Pub.L. 88-511, 78 Stat. 682, and signed into law by the President on August 30, 1964.

A final obstacle blocking realization of this project was the requirement of Section 4(a) of the Bonneville Project Act, 16 U.S.C. § 832c(a), that, without geographical qualification, the BPA give preference to public agencies in its sale of electrical power. App. at D3. As a consequence, privately-owned utilities in the Pacific Northwest expressed concern that their access to such power would be curtailed by sales to public agencies in California. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3343-3344. Of particular concern was

the prospect that such agencies without their own sources of generation would become increasingly dependent on the BPA. *Id.*

The resulting stalemate was broken by passage of the Regional Preference Act, 16 U.S.C. §§ 837 *et seq.* Under Section 1(c) of this statute, the BPA is limited in the sale to California of electrical energy generated at federally-owned hydroelectric facilities in the Pacific Northwest to that energy which "would otherwise be wasted because of a lack of market therefor in the Pacific Northwest at any established rate." 16 U.S.C. §§ 837(c), 837a (App. at D2). As a consequence, California may only purchase from the BPA such electrical energy for which no need whatsoever exists in the Pacific Northwest.

Today, under the plan approved by Congress, the Pacific Northwest-Pacific Southwest Intertie ("Pacific Intertie") consists of two 500 kilovolt, alternating-current ("AC") lines and one 1000 kilovolt direct-current ("DC") line. The two AC lines extend from the John Day Substation near the Columbia River at the border between Oregon and Washington to the Lugo Substation in southern California, a total distance of 945 miles. The DC line extends from the Celilo Converter Station in northern Oregon through central Oregon and Nevada to the Sylmar Converter Station in southern California, totaling some 846 miles in length.

2. History of the Interregional Market

On January 13, 1969, the BPA entered into a contract, entitled the "Exportable Energy Agreement," with fourteen generating utilities in the Pacific Northwest. App. at M1-27. By this agreement, these parties created a scheme for allocating the capacity of the Pacific Intertie during such times when streamflows in the Pacific Northwest exceed the capability of reservoirs in that region to store additional water for future use. During these conditions of spill, the BPA first provides sufficient capacity to fulfill certain, pre-existing contractual commitments. *Id.* at M11. The remaining capacity is then apportioned to each signatory according to its relative share of the total amount of surplus energy the signatories are willing to sell at the rate to be charged by the BPA. *Id.* at M11-12.

Over the next several years, depending on conditions of supply and demand in the Pacific Northwest, an active interregional market developed. When streamflows were large in the Pacific Northwest, a substantial quantity of electrical energy was available for sale to California; conversely, when streamflows were low in that region, little if any became available. At all times other than during conditions of spill, access to the Pacific Intertie was provided to any seller in the Pacific Northwest or Canada that could arrange a transaction with California.

More recently, however, changing economic conditions in the Pacific Northwest have created a continuous surplus of electrical energy. Expectations of rapidly-growing demand failed to materialize, and many generational projects were either temporarily halted or completely abandoned. See *City of Springfield v. Washington Public Power Supply System*, 752 F.2d 1423, 1426 (9th Cir. 1985). Others were completed, but have gone underutilized. Under these conditions, the BPA and utilities in the Pacific Northwest began to compete even more actively among themselves to sell surplus energy to California.

At the same time, as the bill for these various projects came due, the costs incurred by the BPA to serve its customers in the Pacific Northwest increased greatly. In response to this situation, and in particular to hold down the rates charged its regional customers, the BPA undertook a systematic program to collect greater revenues from California. As part of this program, the BPA has several times since 1978 established new, higher rates to be charged California.

On September 7, 1984, following receipt of written comments, but without conducting any formal, evidentiary hearing, the BPA instituted a comprehensive plan governing access to the Pacific Intertie. App.-at-D1-26. By this plan, called the Interim Near Term Intertie Access Policy ("Interim NTIAP"), the capacity of the Pacific Intertie not required by the BPA to support the needs of its "power marketing program" is first used to fulfill various contractual commitments. App. at D19-22. Any remaining capacity is then selectively apportioned under three different conditions, depending on the amount of surplus power available in the Pacific Northwest for sale to California:

Condition 1. During times of spill in the Pacific Northwest, when surplus energy would be wasted if not immediately sold to California, access to the Pacific Intertie is provided pursuant to the Exportable Energy Agreement. App. at D23.

Condition 2. When the Exportable Energy Agreement is not in effect, but the supply of surplus energy nonetheless exceeds the available capacity of the Pacific Intertie, access is apportioned among the BPA and utilities in the Pacific Northwest according to the relative share of the total amount of surplus energy each declares to be available for sale to California at any price. App. at D23-24. Expressly excluded from the Pacific Intertie under this condition are extraregional sellers, such as those in Canada. App. at D25.

Condition 3. When the supply of surplus power is less than available capacity, access for the BPA and utilities in the Pacific Northwest is provided without restriction. App. at D24. Under this condition, any remaining capacity is then, but only then, provided to extraregional utilities. App. at D25.

3. Proceedings Before the Ninth Circuit

On September 19, 1984, the Department of Water and Power of the City of Los Angeles ("LADWP") filed a petition with the Ninth Circuit for review of the Interim NTIAP. Contemporaneously, LADWP filed a motion for stay of the Interim NTIAP pending judicial review and for an order establishing a schedule for expedited briefing of the underlying petition. In its brief supporting this motion, the LADWP rested its challenge to the Interim NTIAP on the grounds (a) that it unlawfully discriminates against California and (b) that it violates the federal antitrust laws.

On December 6, 1984, the CPUC and the CEC each filed a petition with the Ninth Circuit for review of the Interim NTIAP.

On April 24, 1985, a panel of the Ninth Circuit issued an opinion denying LADWP's petition. *LADWP v. BPA*, 759 F.2d 684 (App. at B1-25). According to the court, Congress intended

that the BPA be allowed preference in the transmission of federal power over the Pacific Intertie in order to ensure its ability to operate in a "fiscally selfsupporting" manner. *Id.* at B20. Parenthetically, the court noted that "the antitrust laws do not apply to the federal government." *Id.* The court then ruled that, since it is designed to mitigate "significant revenue shortfalls" which the BPA would otherwise experience, the Interim NTIAP was both authorized and mandated. *Id.* In addition, the court found that, after reserving sufficient capacity on the Pacific Intertie to serve its own purposes, the BPA is free to allocate any remaining amount as long as it does so in a fair and nondiscriminatory manner. *Id.* at B21. Finally, the court concluded that, inasmuch as Congress expressed no intention to the contrary, the BPA has discretion to determine the conditions under which it will transmit electrical power for utilities in Canada. *Id.* at B23.

On June 1, 1985, again without conducting any formal, evidentiary hearing, the BPA instituted the Revised Near Term Intertie Access Policy ("Revised NTIAP"), not significantly different in its terms from the Interim NTIAP. App. at G1-22. On August 2, 1985, the CEC filed with the Ninth Circuit a petition for review of the Revised NTIAP. On August 26, 1985, the CPUC did likewise. On September 9, 1985, the Ninth Circuit consolidated these two petitions with the petitions filed by the CPUC and the CEC for the review of the Interim NTIAP.

On November 6, 1987, a second panel of the Ninth Circuit issued an opinion denying the petitions of the CPUC and the CEC. *CEC v. BPA*, 831 F.2d 1467 (App. at A1-28). First, the court rejected arguments that the Revised NTIAP constitutes ratemaking, concluding that only the prices charged by nonfederal sellers, and not those by the BPA, are affected. App. at A11. Next, with respect to the discriminatory effects of the Revised NTIAP, the court believed itself bound by the opinion dismissing LADWP's petition. *Id.* at A14. Finally, the court concluded that the Revised NTIAP's anticompetitive effects are justified by the need of the BPA to meet its financial obligations. *Id.* at A20. In dissent, Judge Norris found that the Revised NTIAP represents unjustified discrimination in favor of utilities in the Pacific Northwest:

I can see no statutory authority under which the BPA is authorized to discriminate so clearly in favor of Northwest utilities and against Southwest utilities and energy users. Indeed, the relevant statutory language appears to point the other way. The anticompetitive, pro-Northwest utility slant of the pro rata intertie access plan seems plainly incompatible with the statutory language requiring that the BPA be "fair and non-discriminatory" in its treatment of all utilities, 16 U.S.C. § 838d, as well as the clear understanding recognized in [*LADWP v. BPA*] that the purpose of the intertie was to benefit both the Northwest and Southwest, 759 F.2d at 694.

Id. at A26-27.

REASONS FOR GRANTING THE WRIT

This case poses ramifications of enormous magnitude for California, the Pacific Northwest, and the entire United States. Most immediately, if the decision below is allowed to stand, and the BPA can continue to exert monopolistic control over the interregional market, consumers throughout California will have to pay several hundred million dollars more each year than they would under a system of open access to the Pacific Intertie. Over the longer term, as the anticompetitive practices of the BPA cease to make it any longer an economic, reliable source of supply, and California is forced to turn to the increased development of its indigenous resources, the interregional market will suffer a severe and lasting decline. For the United States as a whole, a dangerous precedent will be established, enabling federal proprietary agencies to charge with impunity whatever their markets will bear whenever they can control the transmission of electrical power.

Such a result would be particularly egregious in view of the role Congress intended the BPA to play in accommodating, not usurping, use of the Pacific Intertie. The failure of the Ninth Circuit to confront this fact, together with its too ready willingness to excuse the BPA from carrying out its responsibility of maintaining competition to the maximum extent possible, must be redressed. Indeed, by its refusal to recognize the full effect of

the Revised NTIAP on prices charged California, that court has rendered illusory the protection Congress intended the Federal Energy Regulatory Commission ("FERC") provide against the BPA's regional bias.

In sum, this case presents issues of national importance involving public policy and the construction of major federal statutes which demand this Court's authoritative resolution. In view of its refusal to undertake an independent analysis of those statutes, its disregard of the rights of California to receive fair access to the Pacific Intertie, and its immediate and lasting effect on the interregional market, the decision below must be reversed. Given the bias of the BPA in favor of the Pacific Northwest and the Ninth Circuit's acquiescence in that federal agency's exercise of discretion beyond that granted by Congress, review by this Court represents the final opportunity to reverse a result as unjust as it would be fiscally improvident.

I

THE NINTH CIRCUIT OVERLOOKED THE INEXTRICABLE LINK BETWEEN THE ALLOCATIONAL SCHEME CREATED BY THE REVISED NTIAP AND PRICES CHARGED CALIFORNIA.

In rejecting the contentions of the CPUC and the CEC that the BPA's institution of the Revised NTIAP constitutes ratemaking, the court below concluded that review by the FERC would not further the purposes of Congress in enacting the Pacific Northwest Act. App. at A10. Quite to the contrary, however, such review is an essential element of the protection Congress intended California be provided against the BPA's bias in favor of the Pacific Northwest. *See Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1113 (9th Cir. 1984). Thus, under Section 7(k) of the Pacific Northwest Act, 16 U.S.C. § 839e(k) (App. at K5), the FERC is directed to determine whether any rate or schedule established by the BPA for the sale of electrical energy to California would "encourage the most widespread use of Bonneville Power" at "the lowest possible rates to consumers consistent with sound business principles." *U.S.*

States Department of Energy, Bonneville Power Administration, 37 FERC ¶ 61,278 at pp. 61,836-7 (1986). As the FERC has explained the vital importance to California of such review,

Section 7(k) was intended as a unique check on the [BPA's] ability to set non-firm rates outside the Pacific Northwest Region in order to assure that the [BPA] complies with the pre-existing statutory requirements in designing such rates.

U.S. Secretary of Energy, Bonneville Power Administration, 20 FERC ¶ 61,292 at p. 61,558 (1982); see also *Central Lincoln Peoples' Utility District v. Johnson*, *supra*, 735 F.2d at 1113.

These requirements apply just as certainly to any change proposed by the BPA regarding the availability of any schedule it has previously established for the sale of electrical energy. *Portland General Electric Company v. Johnson*, 754 F.2d 1475, 1484 (9th Cir. 1984). Indeed, by fundamentally affecting rates charged and services provided, any such change constitutes the very essence of ratemaking. *Id.* at 1481. Moreover, in reviewing any such change, the FERC must consider the totality of the circumstances and not just the direct effect on rates. *CEC v. BPA*, 754 F.2d 1470, 1474 (9th Cir. 1985).

When the totality of the circumstances surrounding the BPA's institution of the Revised NTIAP are fully considered, the conclusion is inescapable that rates charged California by the BPA have been substantially affected. As freely acknowledged by the BPA, the Revised NTIAP is intended to enhance its ability to collect greater revenues from California, and thereby reduce the rates that its customers in the Pacific Northwest would otherwise be charged. App. at A13, n. 2. The BPA accomplishes this by allocating the capacity of the Pacific Intertie to itself and various utilities in the Pacific Northwest on the basis of fixed, proportionate shares. On this basis, since no seller in the Pacific Northwest, either federal or nonfederal, can increase its allocation, any incentive to reduce price is severely reduced. App. at B13. In this way, bolstered by the exclusion of Canadian utilities, real competition is effectively eliminated.

This effect is most obvious under Condition 1 when the Revised NTIAP establishes an artificially high price below which neither the BPA nor any utility in the Pacific Northwest may sell nonfirm energy to California. In fact, just one month prior to instituting the Interim NTIAP, the BPA notified its cosignatories that thenceforward it would, contrary to all prior practice, apply its highest generally available rate for the sale of nonfirm energy to California under the Exportable Energy Agreement. App. at N1. As a result, by restricting the flexibility, and thus the competitiveness, of utilities in the Pacific Northwest, the BPA is now able to charge the highest rate possible to California even during those times of spill when competition should be the greatest.

As an additional consequence, by changing the conditions under which access had previously been provided to the Pacific Intertie, the Interim and Revised NTIAPs have directly affected the amount of nonfirm energy which can be sold to California. Thus, by allocating fixed portions of the capacity of the Pacific Intertie to utilities in the Pacific Northwest, the BPA has limited the amount of nonfirm energy which it can sell to California. Furthermore, under the Revised NTIAP's scheme for providing access, if the BPA or any other seller in the Pacific Northwest refuses to use the full amount of its allocated capacity, the Pacific Intertie will be underutilized, and surplus energy in the Pacific Northwest wasted—all for the purpose of insuring that the BPA and utilities in the Pacific Northwest can charge the highest price possible in each transaction with California. As observed by Judge Norris in his dissent,

To the extent that northwest utilities [and the BPA] are under no obligation to use their pro rata share of intertie access, the BPA's interim plan also acts as a restriction on output. Output restrictions, like restrictions on price competition, raise prices above the competitive market level. Thus, the interim access policy—suppressing both price and output—is a double curse for southwest utilities and energy consumers.

App. at A26, n. 2.

Accordingly, contrary to the opinion of the court below, by substantially affecting both the price and amount of electrical energy sold to California, the BPA's institution of the Interim and Revised NTIAPs is inextricably related to ratemaking. As a result, pursuant to Section 7(k) of the Pacific Northwest Act, the BPA was required to submit any plan it might develop governing access to the Pacific Intertie to the FERC for confirmation and approval. In view of the BPA's failure to comply with this requirement, including a demonstration that the most widespread use of federal energy would be encouraged at the lowest possible rate to consumers in California, neither the Interim nor the Revised NTIAP can be considered legally valid. Moreover, unless the decision below is reversed, the protection which Congress intended California receive against the bias of the BPA in favor of the Pacific Northwest will be rendered meaningless.

II

THE NINTH CIRCUIT ERRED IN FAILING TO ADDRESS THE DISCRIMINATORY EFFECTS OF THE REVISED NTIAP ON CALIFORNIA.

In refusing to consider whether the Revised NTIAP unlawfully discriminates against California, the court below believed itself bound by the determination in *LADWP v. BPA*, *supra*, App. at B25, that "'BPA is required to allocate use of federally-owned transmission facilities in a manner which accords first preference to transmission of federal power and then to transmission of other Northwest-generated power.'" App at A14-15. As explained in the legislative history of the Regional Preference Act, however, the BPA's authority to reserve capacity on the Pacific Intertie is not unlimited:

In determining the existence of capacity excess to the needs of the Government, Federal needs reasonably foreseeable may be included, but [the BPA] may not decline to enter into wheeling agreements merely because [it] may have energy available for sale to serve the same load.

H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News at 3350. Thus, the BPA may reserve

sufficient capacity to meet reasonably foreseeable as well as current needs —“so long as the agency does not compete with other utilities on the mere speculation that it ‘may have energy available’ sometime in the future to sell to the same customer.” App. at B17.

Once its legitimate needs have been met, the BPA is directed to transmit electrical energy for any utility which can arrange a transaction over the Pacific Intertie. As provided by Section 6 of the Regional Preference Act,

Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in Section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas.

16 U.S.C. § 837e (App. at K1). Similarly, under Section 6 of the Transmission System Act, such capacity must be made available “on a fair and nondiscriminatory basis.” 16 U.S.C. § 838d (App. at K2). Taken together, these statutes oblige the BPA to act as a carrier fairly and without discrimination.

This obligation applies equally to utilities in the Pacific Northwest and Canada—that is, to the transmission of electric energy from a “generating plant in the Pacific Northwest or Canada.” 16 U.S.C. § 837e; *see also* dissent of Judge Norris, App. at A25, n.1. As the legislative history of the Regional Preference Act further explains,

[The BPA] may enter into agreements for the wheeling of energy generated in Canada, *but such energy stands on the same basis as any other non-Federal energy*. It does not have the priority granted to Federal energy and Canada’s entitlement to downstream power benefits under the proposed treaty.

H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News at 3350 (emphasis added). Thus,

although standing in line behind federal energy and Canada's entitlement to such "downstream power benefits," energy generated in Canada must be treated the same as "any other non-Federal energy."

Properly understood, therefore, the BPA's discretion regarding operation of the Pacific Intertie is closely constrained. In the first place, notwithstanding the needs of its "power marketing program", the BPA is authorized only to reserve an amount of capacity on the Pacific Intertie equal to the electrical energy it has actually arranged to sell to California. Any capacity remaining after the BPA has met its legitimate needs must then be made available to any utility in the Pacific Northwest or Canada that can arrange a transaction with California. After all, Congress intended that the Pacific Intertie be used at least in part for the benefit of utilities in California. App. at B23. As explained by Judge Norris,

The exclusion of Canadian power, though arguably unobjectionable in its discrimination against Canadian producers, also discriminates against southwest energy purchasers—intended beneficiaries of the Intertie.

App. at A25, n.1.

In direct contravention of these statutory requirements, the BPA has instituted a scheme designed to deny utilities in California fair access to their counterparts in the Pacific Northwest and Canada. Thus, by allocating capacity for itself and utilities in the Pacific Northwest on the basis of fixed, proportionate shares, and by excluding utilities in Canada except during Condition 3 when they pose no competitive threat, the BPA has acted to usurp rather than accommodate use of the Pacific Intertie. In turn, the refusal of the court below to undertake an independent analysis of the statutes applicable to the BPA will lead inevitably, if not reversed by this Court, to immediate and lasting harm to California and the entire interregional market. Such a result, unlawfully discriminatory in its design and economically shortsighted in its effect, must not be allowed to stand.

III

THE NINTH CIRCUIT WRONGLY EXCUSED THE BPA FROM CARRYING OUT ITS RESPONSIBILITY TO MAINTAIN COMPETITION TO THE MAXIMUM EXTENT POSSIBLE.

Although recognizing that the BPA is required to consider the interests of competition in allocating the capacity of the Pacific Intertie, the Ninth Circuit concluded that the BPA's primary obligation is to be fiscally self-supporting. App. at A15-16. In so doing, however, the Ninth Circuit wrongly excused the BPA from carrying out its responsibility of maintaining competition to the maximum extent possible consistent with the public interest. See *Otter Tail Power Company v. United States*, 410 U.S. 366, 374 (1973). Indeed, at no time has the BPA demonstrated why its fiscal needs cannot be met without resort to monopolistic control over the Pacific Intertie. Nor has it explained why the exercise of such control is necessary to protect utilities in the Pacific Northwest from competition. Under such circumstances, "the reviewing court must closely scrutinize [the agency's] action in light of the . . . statutory obligations to protect the public interest and to enforce the antitrust laws." *Gulf States Utilities Company v. Federal Power Commission*, 411 U.S. 747, 763 (1973).

That the Interim and Revised NTIAPs represent nothing less than an attempt to exert monopolistic control over the Pacific Intertie is beyond dispute. App. at A16. Thus, by allocating capacity on the basis of fixed, proportionate shares, these policies have effectively eliminated competition in the sale of electrical power to California. App. at A26, B13. As a result, the BPA and utilities in the Pacific Northwest are now able to charge the highest price possible in each transaction with California.

Such a result is in direct contravention of the intent of Congress that the BPA further, not impede, competition. Thus, under Section 2(b) of the Bonneville Project Act, the BPA is directed "to encourage the widest possible use of all electric energy that can be generated and marketed" and "to prevent the monopolization thereof by limited groups." 16 U.S.C. § 832a(b) (App. at K2). Similarly, Section 5 of the Flood Control Act of 1944 provides that the BPA "shall transmit and dispose of such . . . energy in such manner as to encourage the most widespread use

thereof at the lowest possible rates to consumers consistent with sound business principles. . . ." 16 U.S.C. § 825s (App. at K3).

The BPA cannot escape these requirements by asserting that its financial difficulties are a consequence somehow of its failure to collect sufficient revenues from California. Rather, no matter from which group of customers revenues are collected, the BPA's total costs are exactly the same. *Central Lincoln Peoples' Utility District v. Johnson, supra*, 735 F.2d at 1115. Consequently, greater revenues from California serve only to reduce rates which would otherwise be charged customers in the Pacific Northwest.

In sum, the need of the BPA to be fiscally self-supporting does not relieve it from maintaining competition to the maximum extent possible. By failing to scrutinize closely the BPA's development of the Interim and Revised NTIAPs, however, the decision below permits the creation of a series of monopolies for the BPA and utilities in the Pacific Northwest. Such a result not only denies utilities in California fair use of the Pacific Intertie but directly contravenes the statutory scheme established by Congress. As pointed out by Judge Norris,

The BPA's pro rata allocation scheme for available intertie capacity—a scheme which if implemented by a private party would plainly violate the antitrust laws—paternalistically restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy offered for sale by privately-owned Northwest utilities.

App. at A25-26.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Ninth Circuit should be granted.

Respectfully submitted,

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Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION, *Petitioner,*

vs.

BONNEVILLE POWER ADMINISTRATION; JAMES J. JURA,
as Administrator; JOHN S. HERRINGTON, as Secretary of
the Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA, *Respondents.*

CALIFORNIA PUBLIC UTILITIES COMMISSION, *Petitioner,*

vs.

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as Administrator; JOHN S. HERRINGTON, as Secretary of
the Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA, *Respondents.*

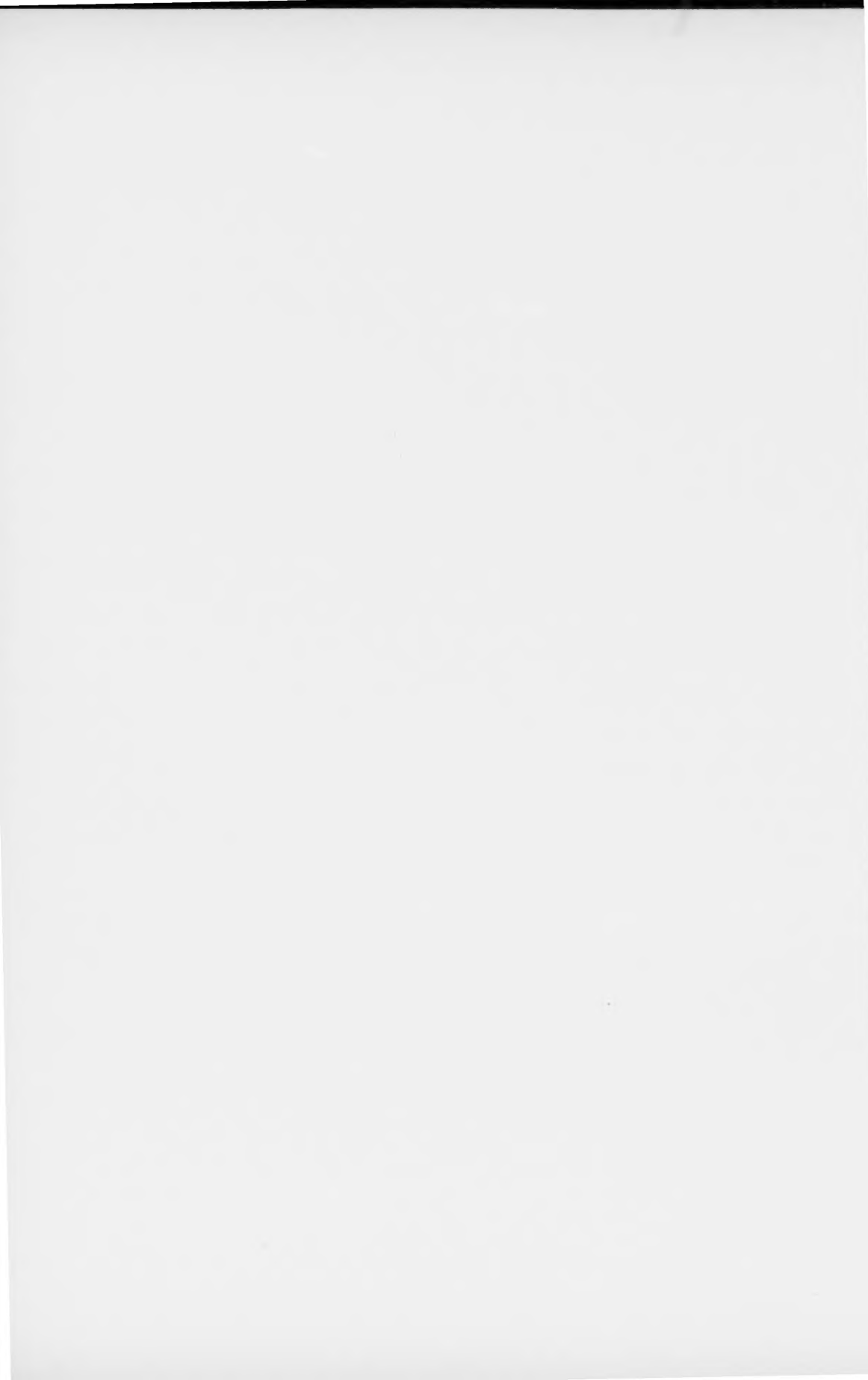
APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI

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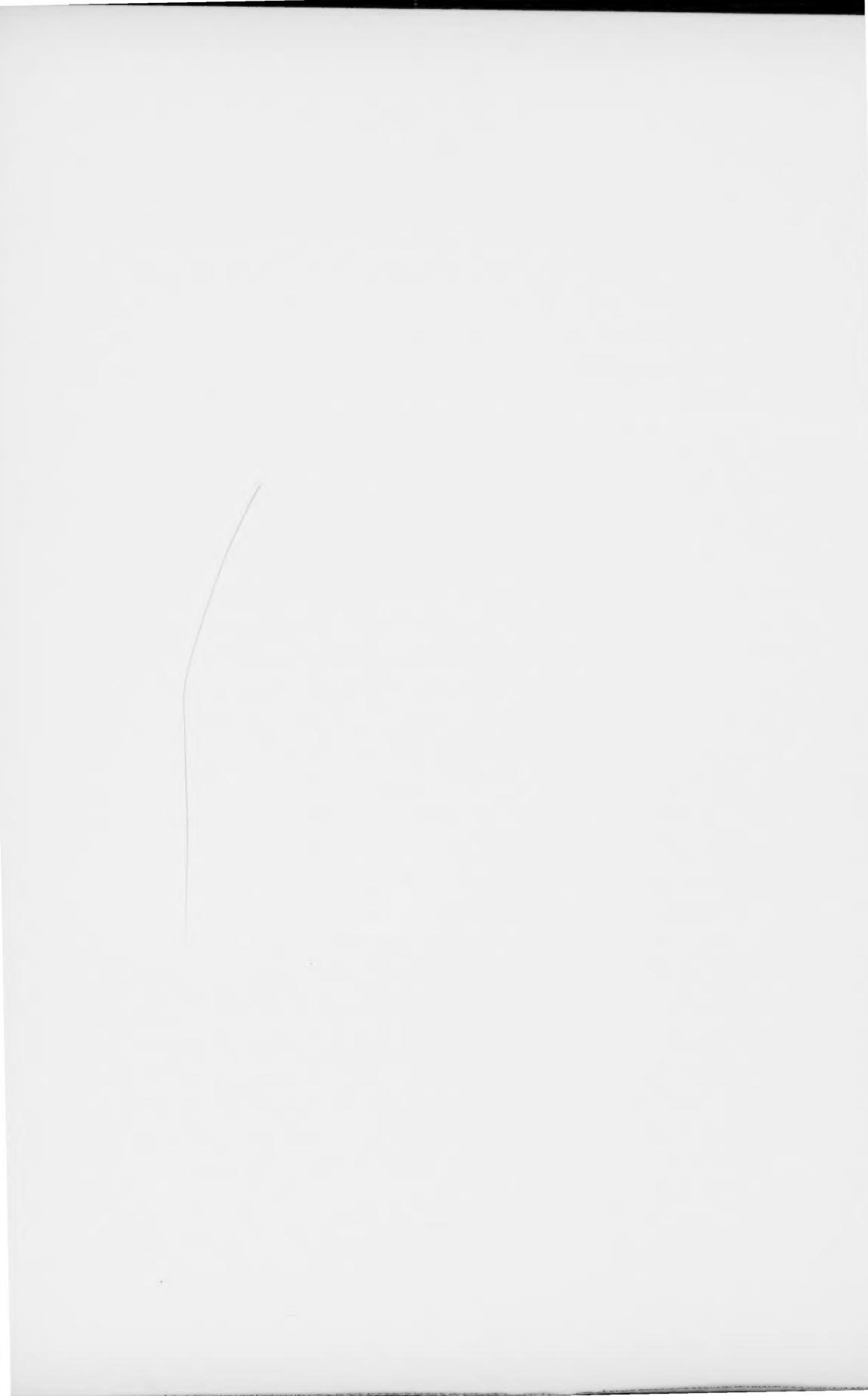
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APPENDIX A

APPENDIX A

CALIFORNIA ENERGY RESOURCES
CONSERVATION
AND DEVELOPMENT COMMISSION,
Petitioner

v.

BONNEVILLE POWER ADMINISTRATION;
James J. Jura, as Administrator,*
and John S. Herrington, as Secretary of the
Department of Energy of the United States of
America, Respondents.

PUBLIC UTILITIES COMMISSION OF the
STATE OF CALIFORNIA, Petitioner

v.

James J. JURA, as Administrator
of the Bonneville Power Administration*;
John S. Herrington, as Secretary of
the Department of Energy of
the United States of America;
and the United States of America, Respondents.

Nos. 84-7836, 85-7430, 84-7838 and 85-7470.

* James J. Jura, the current Administrator of the Bonneville Power Administration, is substituted for his predecessor in office pursuant to Fed.R. App.P. 43(c)(1).

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 13, 1986.

Decided Nov. 6, 1987.

Before TANG, SCHROEDER and NORRIS,
Circuit Judges.
SCHROEDER, Circuit Judge:

Introduction

These are consolidated petitions to review the Bonneville Power Administration's [BPA] interim access policy for Pacific Northwest-Pacific Southwest Intertie, a system of high voltage lines transmitting federal and non-federal power from the Pacific Northwest to the Southwest. The petitioners are: (1) the California Public Utilities Commission (CPUC), a government entity responsible for insuring reasonable rates for the State's energy consumers, Cal.Pub.Util.Code §§301-322, and (2) the California Energy Resources Conservation and Development Commission (CEC), a state agency that adopts energy policies, forecasts energy needs, and certifies construction of power plants in California, Cal. Pub. Res. Code §§25200, 25216. The essence of their claim is that the access policy unlawfully excludes low cost energy generated in the Pacific Northwest and Canada from BPA's transmission lines and thus prevents that lower cost energy from reaching California electric power consumers.

This is the second challenge to the interim policy. In the first, we upheld it over the objections of the Los

Angeles Department of Water and Power. *Department of Water & Power of the City of Los Angeles v. Bonneville Power Admin.*, 759 F.2d 684 (9th Cir.1985). Several of the objections of these petitioners are similar to objections which we discussed in that case.

Before reaching the merits of petitioner's objections, however, we must first discuss a threshold jurisdictional question. The question is whether the policy can be considered final agency action that is now reviewable on the merits by this court, or whether the policy is in the nature of a rate that is not final, and therefore not yet subject to our review, until reviewed by the Federal Energy Regulatory Commission [FERC]. See 16 U.S.C. §§839e(i), (k); *Central Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1109 (9th Cir.1984). We conclude that we have jurisdiction to review because the policy is not a rate. On the merits, we find no basis for overturning the agency's actions, adopting the policy on a temporary interim basis pending implementation of a long term policy.

Facts

In *Department of Water & Power*, this court recently set forth a description of BPA's operations and the provisions of the Intertie Access Policy. See 759 F.2d at 685-90. Because they are important to this case, we will again review the background facts.

BPA is a federal agency that markets hydroelectric power within the Pacific Northwest and oversees distribution of power from the Pacific Northwest to California and the Southwest desert. See 16 U.S.C. §832a. Its operations are governed in part by the Pacific Northwest Electric Power Planning and

Conservation Act, 16 U.S.C. §§839-839h (the Regional Act). The Regional Act prescribes procedures for setting and modifying rates for the sale and transmission of energy, and requires FERC approval of rates. 16 U.S.C. §§839e(i), 839e(k). It also requires BPA to establish rates that are sufficient to insure BPA's fiscal independence. 16 U.S.C. §839e(a)(1). BPA's operations are also governed by the Bonneville Project Act, 16 U.S.C. §§832-832l, the Pacific Northwest Power Preference Act, 16 U.S.C. §§837-837h, and the Federal Columbia River Transmission System Act, 16 U.S.C. §§838-838k. *See generally* Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash.L.Rev. 175 (1983).

In the late 1960's, Congress established the Pacific Northwest-Pacific Southwest Intertie. 16 U.S.C. §§838-838k. The purpose of the Intertie is to allow the Pacific Northwest and Pacific Southwest to exchange power when one region has a surplus supply and the other region has a heavy demand. BPA owns and operates most of the Intertie transmission lines above the Oregon-California border. A small group of California utilities owns the lines south of Oregon. *See Department of Water & Power*, 759 F.2d at 686.

On its lines, BPA transmits both federal "firm" and "nonfirm" power. Firm power is provided with the assurance of continued availability, and nonfirm power is provided only when supply exceeds firm power commitments. BPA also "wheels" non-federal firm and the less expensive nonfirm power for public and private utilities at established rates. *See id.* at 686. In selling its own firm and nonfirm power, BPA is statutorily required to give priority to purchasers within the

Northwest, 16 U.S.C. §837a, and to public bodies and cooperatives, 16 U.S.C. 832c(a). Sales to purchasers outside the Northwest are limited to surplus energy, or energy "which would otherwise be wasted because of the lack of a market therefor in the Pacific Northwest at any established rate." 16 U.S.C. §§837(c), (d) and 837a.

Because the Intertie has a limited transmission capacity, BPA must provide for allocation of Intertie capacity among competing power producers. In allocating Intertie capacity, BPA is statutorily required to give itself priority. 16 U.S.C. §837e. Any capacity in the Intertie "which is not required for the transmission of Federal energy . . . shall be made available as a carrier for transmission of other electric energy." *Id.* Additionally, BPA "shall make available to all utilities on a fair and nondiscriminatory basis, any [excess] capacity in the Federal transmission system." 16 U.S.C. §838d.

Before adoption of the policies challenged here, BPA generally allowed access to the Intertie to be determined by the spot market. This meant that producers offering the most attractive prices at any given moment could make sales and obtain Intertie access until capacity was reached. On September 7, 1984, BPA promulgated an interim Near Term Intertie Access Policy to provide a more predictable mechanism for allocating Intertie capacity. 49 Fed.Reg. 44,232 (Nov. 5, 1984). The policy was adopted after a series of public hearings and publication of notices in the *Federal Register*. See 48 Fed.Reg. 33,515 (July 22, 1983); 49 Fed.Reg. 5,990 (Feb. 16, 1984); 49 Fed.Reg. 30,346 (July 30, 1984); 50 Fed.Reg. 19,781 (May 10, 1985). In 1985, the Los Angeles Department of Water

and Power challenged the policy as an abuse of discretion and beyond BPA's statutory authority. This court upheld the policy. See *Department of Water & Power*, 759 F.2d at 695.

On June 1, 1985, BPA adopted a revised Near Term Intertie Access Policy. See 50 Fed.Reg. 26,827 (June 28, 1985). This policy is substantially identical to the interim policy. Both policies are challenged here and are referred to collectively as the Access Policy.

Under the Access Policy, assured transmission service is available for firm power sold by Pacific Northwest producers to California purchasers under BPA-approved sales contracts. Extraregional producers, including Canadian producers, cannot obtain assured service for firm power. Any capacity on the Intertie in excess of firm power needs is sold on an hourly or daily ("nonfirm") basis under one of three "conditions." Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,830-31.

Condition One incorporates the Exportable Energy Agreement of 1969. This Agreement becomes operative only when river flows into Pacific Northwest dams are sufficiently high to threaten wasteful "spillover" conditions. Under this Agreement, BPA and each Northwest utility that declares a surplus of energy at BPA's "applicable rate" may sell and transmit a pro rata portion of its surplus to California purchasers. Non-regional producers, like Canadian utilities, may not use the Intertie when the Exportable Agreement takes effect. *Id.* at 26,831.

Condition Two becomes operative when ever BPA and Pacific Northwest utilities have enough surplus nonfirm energy to fill the Intertie at any price. Again, access to the Intertie is limited to BPA and Pacific

Northwest producers. Each receives access to a pro rata portion of its declared surplus. *Id.*

Finally, under Condition Three, which becomes operative only when BPA and the Northwest utilities lack sufficient surplus to fill the Intertie at any price, extraregional utilities, including Canadian utilities, may gain access to the Intertie. *Id.*

Although the revised Near Term Intertie Access Policy was originally set to terminate on September 30, 1986, with the adoption of a long term policy, BPA extended the expiration date to June 30, 1987, to allow further evaluation of the long term policy. *See* 51 Fed.Reg. 23,819 (July 1, 1986). BPA has not yet adopted a long term policy, and the expiration of the interim policy has further been extended until June 30, 1988, or upon implementation of the long term policy, whichever occurs first. *See* 52 Fed.Reg. 9,530 (March 25, 1987).

Jurisdiction: Is the Policy a Rate?

CEC and CPUC argue here that BPA's adoption of the Access Policy constituted ratemaking and thus requires FERC approval before judicial review is available. The parties in *Department of Water & Power* did not raise this jurisdictional issue, and the court there did not address it. Since the question of jurisdiction was neither raised nor decided, this court's assumption of jurisdiction in *Department of Water and Power* does not establish controlling precedent on the appealability issue. *See Matter of Baker*, 693 F.2d 925, 925-26 (9th Cir.1982) (per curiam). Now that it is squarely presented, we must decide the issue.

The Regional Act requires BPA to set rates for electric power that are sufficient to cover costs and to recoup the federal investment in BPA's facilities "over a reasonable period of years." 16 U.S.C. §§ 839e(a)(1), 832f, and 838g. The Act prescribes procedures for establishing and modifying rates. The procedures include notice in the Federal Register, public hearings with limited cross-examination, and decisions on the record. See *id.* § 839e(i). FERC must approve rates before they become final and effective. *Id.* § 839e(a)(2). For a brief historical discussion of federal power marketing agencies' ratemaking and review procedures, see *United States v. Tex-La Elec. Co-op.*, 693 F.2d [sic] 392, 405-07 (5th Cir.1982).

Final rate determinations and other final agency actions are subject to original judicial review in this court. See 16 U.S.C. § 839f(e); *Public Util. Comm'n of the State of Calif. v. FERC*, 814 F.2d 560, 561 (9th Cir.1987); *California Energy Comm'n v. Johnson*, 767 F.2d 631, 633 (9th Cir.1985); *Central Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1108-09 (9th Cir.1984). On review, we must affirm the agency's action unless it is arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. 16 U.S.C. § 839f(e)(2); 5 U.S.C. § 706; *Department of Water & Power*, 759 F.2d at 690. Additionally, BPA's interpretation of the Regional Act is to be given great weight and should be upheld if reasonable. *Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389, 104 S.Ct. 2472, 2479, 81 L.Ed.2d 301 (1984); *California Energy Resources Conservation & Dev. Comm'n v. Johnson*, 783 F.2d 858, 860 (9th Cir.1986), *modified*, 807 F.2d 1456, 1459 (1987).

This court's most recent discussions of BPA ratemaking are in *Atlantic Richfield Co. v. Bonneville Power Admin.*, 818 F.2d 701 (9th Cir.1987) (per curiam), and *City of Seattle v. Johnson*, 813 F.2d 1364 (9th Cir.1987) (per curiam). In *Atlantic Richfield*, we held that a "customer charge" imposed by BPA as part of its overall charge for energy is a rate for the sale or disposition of power and is subject to FERC review. 818 F.2d at 705. Similarly, in *City of Seattle*, we held that an "availability charge" imposed on certain contract customers is also a rate. 813 F.2d at 1367. The availability charge is a fee designed to recover some fixed costs associated with BPA's duty under the contracts to stand ready to deliver energy when demanded. We expressly rejected the utilities' contention that the availability charge was a penalty for not purchasing energy, rather than a rate. We reasoned that so limiting the meaning of "rate" would improperly limit FERC's authority under the Regional Act to review BPA charges. *Id.*

Neither *Atlantic Richfield* nor *City of Seattle* is apposite to the facts presented here. As we noted in *City of Seattle*, "[r]ates are simply the charges BPA imposes on its customers for the provision of service." 813 F.2d at 1367; see also *Black's Law Dictionary* 1134 (5th ed. 1979) (defining "rate" when used in connection with public utilities as "price stated or fixed for some commodity or service . . . measured by a specific unit or standard"). In its rules establishing procedures for reviewing rates of other power marketing agencies, FERC itself defines a rate as "the monetary charge or the formula for computing such a charge for any electric service." 10 C.F.R. §903.2(1).

The Access Policy, however, does not impose any charge at all or define any formula for computing charges. Nor does it give BPA authority to increase or decrease its own established charges for energy. Because it does not do so, FERC review of the Access Policy would not further the purposes of such review, which are first to insure that BPA's regional and nonregional rates are adequate and equitable, and second to insure that nonregional rates comply with BPA's organic statutes, see 16 U.S.C. §839e(a)(2) and (k); *Central Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1110-13 (9th Cir.1984). FERC apparently agrees, for it has stated that the Access Policy is not ratemaking subject to its approval. See 33 FERC (CCH) ¶61,235, at p. 61,486 (Dec. 12, 1985).

In support of their argument that adoption of the Access Policy constituted ratemaking, the petitioners here rely principally on *Portland General Elec. Co. v. Johnson*, 754 F.2d 1475 (9th Cir.1985). In that case, we held that BPA's offer to sell energy to one class of customers at a rate approved for another class was ratemaking. *Id.* at 1481. We explained that "BPA's rates are not an interchangeable set of prices among which it is free to choose in any particular sale of energy A change in the availability provisions of the rate schedules constitutes ratemaking." *Id.* Similarly, in a companion case to *Portland General*, we held that BPA engaged in ratemaking when it agreed to purchase several regional utilities' scheduling rights to a nuclear power plant, and that agreement was "inextricably linked" to BPA's agreement to sell those same utilities federal power as replacement. *California Energy Resources Conservation & Dev. Comm'n v. Bonneville Power Admin.*, 754 F.2d 1470, 1474 (9th Cir.) (noting that "paying the buyer to buy is the same thing

as reducing the price the buyer must pay”), *cert. denied*, 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985). In both cases we concluded that agency action which had the effect of changing those schedules was ratemaking in nature.

Unlike the action in those cases, the BPA action challenged here does not conflict with the agency’s existing rate schedules. The Access Policy is a formal statement of BPA’s Intertie allocation policies. It does not make BPA energy available to purchasers at charges authorized for other purchasers or in any way attempt to avoid established rates. See Near Term Intertie Access Policy: Administrator’s Record of Decision, at 11-16 (Sept. 1984) (Record of Decision I); Revised Near Term Intertie Access Policy: Administrator’s Record of Decision at 11 (May 1985) (Record of Decision II).¹ At most, by altering market forces the Access Policy can affect only the prices non-federal Pacific Northwest producers charge consumers. Yet the ratemaking provisions of 16 U.S.C. §839e apply only to the rates for federal energy and for the transmission of non-federal power. See 16 U.S.C. §839e(a).

1 To the extent that the petitioners argue that adoption of the Access Policy contemporaneously altered the rates that apply to nonfirm energy, they are incorrect. Although BPA previously uses its “spill rate” as the “applicable rate” under the Exportable Energy Agreement, its decision to apply the “standard rate” instead is specifically anticipated by the applicable rate schedule NF-83. See 33 FERC (CCH) 161,235, at p. 61,489. That schedule provides that nonfirm energy shall be sold at the standard rate, unless BPA “offer[s], at its discretion, to schedule Nonfirm Energy at the Spill Rate.” By electing to exercise this discretion, BPA did not change any rates.

Moreover, the parties have not pointed to any allocation provisions of established rate schedules with which the allocation policies challenged here are inconsistent. They probably cannot do so because federal power marketing agencies generally have not included resource allocation policies in rate schedules. FERC defines a rate schedule as a statement describing rates and charges for service, the type of services to which the rates and charges apply, and the classifications and other provisions which directly affect the rates and charges. 18 C.F.R. §300.1(7); 10 C.F.R. §903.2(n). This definition does not include resource allocation decisions which indirectly affect prices of non-federal energy. Rather, before the more recent adoption of formal policies through rulemaking, power allocation decisions of federal power marketing agencies have principally been made on an ad hoc basis by the exercise of the agencies' contracting authority. See *Electricities of N. Carolina v. Southeastern Power Admin.*, 774 F.2d 1262, 1265 (4th Cir.1985); cf. *City of Santa Clara v. Andrus*, 572 F.2d 660, 673-74 (9th Cir.1978) (Secretary of Interior is not required to follow rulemaking procedures when disposing of federal hydroelectric power). Access has never historically been considered an aspect of rulemaking for before BPA adopted the Access Policy, it informally allowed access to the Intertie to be determined by the spot market. See Record of Decision I, at 39.

We consider the totality of the circumstances to determine if BPA action was ratemaking. See *Portland General*, 754 F.2d at 1481; *California Energy Resources Conservation & Dev. Comm'n v. Bonneville Power Admin.*, 754 F.2d at 1474; see also *City of Seattle*, 813 F.2d at 1367 n. 5. Upon examination of all of these considerations, we conclude BPA's action, which

followed the rulemaking procedures, did not amount to ratemaking requiring FERC review. We therefore have jurisdiction to review the Access Policy.

The Merits

CEC and CPUC attack the Access Policy on essentially four grounds. Three of these grounds are discussed in *Department of Water and Power*. They are that the Access Policy lacks factual justification, that it is discriminatory in violation of 16 U.S.C. §§837e and 838d, and that it fails to conform to federal antitrust policy. We deal with those issues first. We then turn to the remaining issue not discussed in prior opinion, namely, that the policy excludes new generating sources in violation of 16 U.S.C. §839f(d) and 837e.

A. Lack of Factual Justification

The petitioners argue that BPA's purported justifications for the policy lack a reasonable basis in fact and that BPA's action was therefore arbitrary, capricious, and an abuse of discretion.² In *Department of Water and Power*, however, this court specifically

2. BPA's justifications include:

1. to "assure[] that BPA has use of its portion of the Pacific Intertie as necessary for BPA's power marketing program";
2. to "enhance[] BPA's ability to recover revenue that otherwise would be lost if BPA failed to manage prudently its portion of the Pacific Intertie"; and
3. to "respond[]" to the recent influx of requests for more space on the Pacific Intertie that there is available capacity."

Near Term Intertie Access Policy, 49 Fed.Reg. at 44,233.

found that the interim Access Policy was factually justified. There, we stated that "BPA has presented reliable evidence that without a policy which carefully allocates Intertie access, it will experience significant revenue shortfalls in coming years. To the extent that the IAP [the Access Policy] is designed to mitigate projected deficits, therefore, the policy is not only statutorily authorized but statutorily mandated." *Department of Water and Power*, 759 F.2d at 693. As the petitioners concede, the interim policy and the revised policy are identical for these purposes. They point to nothing in the record of the revised proceedings that would require reexamination of their contention. Therefore, our earlier determination forecloses review here. See *Royal Development Co. v. National Labor Relations Bd.*, 703 F.2d 363, 368 (9th Cir.1983). CEC's contention that *Department of Water and Power* should not control because the court there was unaware of BPA's huge net revenues and relied on conclusory evidence is merely an assertion that the case would have been decided differently on a different record. It does not provide a basis for disregarding the decision.

B. Discrimination

CEC and CPUC contend that the Access Policy discriminates against extraregional utilities in violation of 16 U.S.C. §§837e and 838d by denying them transmission access whenever a non-federal Pacific Northwest utility has unsold surplus available. Again, their challenge is foreclosed by *Department of Water and Power*. There, after specifically examining sections 837e and 838d, we stated that "BPA is required to allocate use of federally-owned transmission facilities

in a manner which accords preference first to transmission of federal power and then to transmission of other Northwest-generated power." *Department of Water and Power*, 759 F.2d at 692-93, 695.

C. Antitrust Arguments

The petitioners challenge the Access Policy as failing to conform to the maximum extent possible to the federal antitrust laws and policies. We held in the *Department of Water and Power* case that the anticompetitive effects there challenged were justified by fiscal concerns. *Department of Water and Power*, 759 F.2d at 693. In addition, we observed in a footnote that the antitrust laws were not applicable to BPA. *Id.* at 693 n. 12. We did not in that decision discuss to what extent BPA may be required to consider the policies of the antitrust laws, though we did stress the monopoly power which it had been given. *Id.* at 693.

BPA is required to consider some federal antitrust policies when providing for allocation of Intertie capacity. Congress specifically articulated its intent that BPA operate its transmission lines in part "to prevent the monopolization thereof by limited groups." 16 U.S.C. §832a(b).³ This need to consider the interests

3. This statutory language is more specific than the Federal Power Commission's broad authority to issue public utility securities if "compatible with the public interest," an authority which the Supreme Court held to incorporate from other sections of the Federal Power Act an obligation to consider federal antitrust policies. See *Gulf States Util. Co. v. Federal Power Comm'n*, 411 U.S. 747, 756-59, 93 S.Ct. 1870, 1876-78, 36 L.Ed.2d 635 (1973); see also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973) (rather than

of preserving competition, however, does not override BPA's statutory obligations, repeatedly expressed in 16 U.S.C. §§ 832f, 838g, and 839e(a)(1), to be fiscally self-supporting.

The aspect of the policy which the petitioners attack here and which was not dealt with in our prior decision in *Department of Water and Power* is the pro rata allocation formula for surplus nonfirm energy. Under the Access Policy, firm energy needs are satisfied first and any remaining capacity is used for nonfirm energy. Under Conditions One and Two, Intertie capacity for surplus nonfirm energy is allocated daily or hourly among BPA and Pacific Northwest producers so that each receives a pro rata portion of its declared surplus. Under Condition Three, capacity for surplus nonfirm power is allocated among BPA, Northwest producers, and extraregional producers again based on a pro rata portion of each producer's declared surplus. Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,830- 31. The result is a regularly shifting, horizontal division of the market for surplus nonfirm energy; each eligible producer is temporarily granted sole access to a specified share of the capacity, which it may either use or allow to remain unused without fear of competition by other producers.

CEC and CPUC argue that this pro rata allocation formula is an abuse of discretion because it is anticompetitive and BPA's stated justifications could be achieved by a less anticompetitive alternative. They assert that BPA should be required to adopt a policy whereby it would first allocate to itself whatever

insulate electric power companies from antitrust policies, the Federal Power Act intended to incorporate antitrust concerns).

capacity is needed to satisfy its revenue obligations, and then allow the remainder capacity to be filled by competitive, spot market transactions rather than by the pro rata formula.

The alternative which petitioners now propose was apparently not, however, directly raised during the notice and comment proceedings for the policy on review here. The agency did not evaluate it and we have no record on which to review the petitioner's contentions. See *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir.1984); see also *Association of Data Processing Serv. Orgs. v. Board of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir.1984). During these interim phases of its action BPA and interested parties were concerned with the broader questions of its authority to allocate the Intertie as proposed.⁴ In the circumstances presented here, where we deal with a temporary policy, and administrative proceedings on a long term policy are ongoing, we should defer consideration of the alternative proposed by CEC and CPUC until the agency has been given an opportunity to analyze and act upon the alternative in its Long Term Policy.

We have reviewed the record to determine the reasonableness of BPA's evaluation of the alternatives it did have an opportunity to consider. There were two

4. In its Record of Decision for the revised policy, BPA specifically stated that it elected in the interim proceedings to focus on questions regarding its statutory authority to allocate the Intertie capacity because it had never adopted an allocation policy before. See Record of Decision II, at 3. In the wake of this court's decision in *Department of Water and Power* upholding the interim policy, BPA did not reanalyze all of its prior decisions. See *id.*

such alternatives, and both bear a close relationship to the alternative petitioners now propose.

One was that BPA reserve sufficient Intertie capacity for itself before providing any access to non-federal producers. The proponents of this alternative were concerned that BPA obtain the maximum revenues possible. *See* Record of Decision I, at 9. BPA rejected this proposal for the interim Near Term Policy because it believed that it could satisfy its revenue obligations without adopting such an extreme policy. The agency noted that the Access Policy's provisions for firm access would enable it to increase revenues by insuring that firm energy would be sold at firm energy rates. *See id.* at 9-11. It also believes that its role as a federal steward for transmission services would be best served by sharing the Intertie with Pacific Northwest producers. *See id.* The agency again rejected the alternative in its revised policy when its experience in recovering revenues under the initial Near Term Policy showed its revenue expectation to be justified. *See* Record of Decision II, at 18. Given these justifications and the experience under the initial policy, the agency's decision to reject this alternative in favor of the adopted allocation formula was rational. *See Motor Vehicles*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

Other parties expressed concern that the allocation formula was anticompetitive and recommended that BPA retain its practice of allowing spot market transactions to determine access to the Intertie for surplus nonfirm energy. *See* Record of Decision I, at 35-36. In response, BPA found that the monopsony power of California buyers prevented the market from being competitive even under the spot market practice

and that the distressed prices stemming from the monopsony power resulted in BPA revenue shortfalls. *See id.* at 2, 40. It also found that a pro rata formula would help to equalize Intertie benefits between Pacific Northwest producers and California buyers of energy. *See id.* at 39-41. Finally, the agency remarked that the proposed policy was not as anticompetitive as the opponents asserted because it opened up a new market for firm energy and because other market forces still worked to encourage Pacific Northwest sellers to retain prices competitive with alternate forms of energy. *See id.* at 36-44. After several months experience with the interim policy, BPA reevaluated the anticompetitive effects in promulgating the revised policy. Based on data of non-federal prices provided by the parties, it found that although its revenues had increased as a result of firm energy sales over the Intertie, Pacific Northwest prices had not risen significantly. *See Record of Decision II*, at 1, 7-8. The agency explained that Pacific Northwest producers must still compete with other energy sources. *See id.* at 8. Also, the allocation mechanism results in overestimation of available Intertie capacity and, therefore, producers must remain price competitive to make sales. *See id.*

To counter concerns that the pro rata formula would result in unused Intertie capacity from higher prices, BPA initially proposed an economic override provision that would allow it to reduce the pro rata share of non-federal producer if that producer's share would go unused because of its rates. *See Record of Decision I*, at 33-35. Almost all parties that commented on this provision, including both Pacific Northwest and California parties, objected to this provision as being too intrusive of the business practices to the parties.

See *id.*; Record of Decision II, at 41-43. Given the widespread objection to what was intended to be a mitigation provision in favor of California energy buyers, BPA's rejection of the economic override alternative was reasonable.

On the basis of the record before us, we cannot say that the agency's interim decision to allocate the Intertie as undertaken in the Access policy is arbitrary, capricious, or an abuse of discretion. Rather, the record shows that among the alternatives proposed and considered, BPA adopted what it reasonably believed would be a predictable, fair, and nondiscriminatory basis for allocating the Intertie while insuring adequate BPA revenues.

D. Exclusion of New Generating Sources

With the exception of two specific sources, the Access Policy denies access for firm power to Pacific Northwest resources not operational on September 7, 1984. See Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,828-29. CEC argues that this exclusion discriminates against utilities which develop new generating sources in violation of 16 U.S.C. §§837e and 839f(d).⁵ Because CEC represents California energy interests, it has standing to challenge the overall exclusion of new generating sources which may result in higher prices to California consumers. See *California Energy Resources Conservation & Dev. Comm'n v. Johnson*, 783 F.2d 858, 860 n.2 (9th Cir.1986), *modified*, 807 F.2d 1456 (1987); *California Energy Resources Conservation & Dev. Comm'n v.*

5. CPUC does not raise a similar challenge.

Bonneville Power Admin., 754 F.2d 1470, 1473 (9th Cir.), *cert. denied*, 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985).

Section 9(d) of the Regional Act requires that in providing transmission access BPA not discriminate against a utility on the basis of independent development of resources. 16 U.S.C. §839f(d).⁶ From this language CEC finds a statutory obligation to provide Intertie access to all new generating sources. Section 9(d), however, specifically states that the duty to provide nondiscriminatory service is “subject to . . . any other obligations under existing law.” *Id.* BPA points to two other obligations to justify its decision to

6. In full, section 9(d) provides:

(d) Disposition of power which does not increase amount of firm power Administrator is obligated to provide to any customer [sic]

No restrictions contained in subsection (c) of this section shall limit or interfere with the sale, exchange or other disposition of any power by any utility or group thereof from any existing or new non-Federal resource if such sale, exchange or disposition does not increase the amount of firm power the Administrator would be obligated to provide to any customer. In addition to the directives contained in subsections (i)(1)(B) and (i)(3) of this section and subject to:

- (1) any contractual obligations of the administrator,
- (2) any other obligations under existing law, and
- (3) the availability of capacity in the Federal transmission system,

the Administrator shall provide transmission access, load factoring, storage and other services normally attendant thereto to such utilities and shall not discriminate against any utility or group thereof on the basis of independent development of such resource in providing such services.

16 U.S.C. §839f(d).

exclude newly operational resources under the interim and revised Near Term policies.

The first is BPA's statutory obligation under the Regional Act to use its "authorities . . . to protect, mitigate, and enhance fish and wildlife" in the Columbia River basin. 16 U.S.C. §839b(h)(10)(A); see Record of Decision I, at 82-85; see also *Forelaws on Board v. Johnson*, 743 F.2d 677, 682 (9th Cir.1984), cert. denied, ___ U.S. ___, 106 S.Ct. 3293, 92 L.Ed.2d 709 (1986).⁷ During notice and comment proceedings, interested parties expressed concern that the policy "not enable or encourage resources which adversely affect anadromous fish." Record of Decision I, at 66. BPA was legitimately concerned lest its allocation policy encourage new development harmful to fish and wildlife.⁸ By excluding new generating sources in its

7. Section 4(h)(10)(A) provides:

The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this chapter. Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.

16 U.S.C. §839b(h)(10)(A).

8. The Access Policy also restricts access by existing resources when it will result in a use of resources that adversely affects fish and wildlife. See Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,829. CEC does not contend that BPA lacks authority to establish this condition for access.

interim and revised Near Term policies, BPA could avoid encouraging harmful development while it evaluated less restrictive alternatives. BPA could also pursue its statutory obligation to be fiscally self-supporting while it developed an alternative.⁹

Additionally, under the National Environmental Policy Act [NEPA], 42 U.S.C. §§4321-4361, BPA must prepare an environmental impact statement before undertaking any action that would significantly affect the quality of the environment. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 681-82 (9th Cir.1984), *cert. denied*, ___ U.S. ___, 106 S.Ct. 3293, 92 L.Ed.2d 709 (1986). Because of the uncertain impact of the allocation policy on the environment, the agency reasonably concluded that it should exclude new generating sources in the interim and revised Near Term policies.

CEC nevertheless recites 16 U.S.C. §837e is support of its assertion that the exclusion provision exceeds statutory authority. That section provides that the Intertie "shall be made available as a carrier for transmission of [non-federal] electric energy." 16 U.S.C. §837e.¹⁰ CEC argues that it mandates access to

9. The Near Term Policy expressly indicates that the Long Term Policy will eliminate the total exclusion of new generating sources in favor of a less restrictive exclusion. As anticipated, the Long Term Policy will exclude new resources "if construction or operation of these resources will adversely impact fish and wildlife resources." *See Revised Near Term Intertie Access Policy*, 50 Fed.Reg. at 26,830 (emphasis added).

10. §837e. Transmission lines for other electric energy; rates
Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with

all new sources regardless of environmental impact. The legislative history of the subsequently enacted Regional Act makes clear, however, that environmental concerns are to be given a heightened priority and that the Regional Act “creates a new obligation on the region, the BPA, and other Federal agencies to protect, mitigate and enhance fish and wildlife.” 126 Cong.Rec. 29809 (1980) (statement of chief sponsor Rep. Dingall), *reprinted in United States Department of Energy, Legislative History of the Pacific Northwest Power Planning and Conservation Act* 138 (1981); see 16 U.S.C. §839(6); see also 126 Cong.Rec. 27825 (1980) (statement of Rep. Bonker) (“The language in this bill — if interpreted according to the historical development and record of this legislation — will insure that power needs and fish needs are considered equally in the allocation of available water resources. That is the intent of Congress.”), *reprinted in Legislative History at* 190. The Regional Act’s focus on preservation and

the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas. The transmission of other electric energy shall be at equitable rates determined by the Secretary, but such rates shall be subject to equitable adjustment at appropriate intervals not less frequently than once in every five years as agreed to by the parties. No contract for the transmission of non-Federal energy on a firm basis shall be affected by any increase, subsequent to the execution of such contract, in the requirements for transmission of Federal energy, the energy described in section 837h of this title, or other electric energy.

16 U.S.C. §837e.

conservation modifies BPA's preexisting directives emphasizing wide-spread use of energy, sound business principles, and the lowest rates possible. See Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash.L.Rev. 175, 232-35 (1983).

We deal here with an interim ban. The petitioners do not point to any planned source which has yet been affected adversely. Although we do not purport to decide whether an absolute exclusion of new generating sources would be reasonable in a long term access policy, the present interim exclusion of new generating sources is not facially invalid.

The petitions are DENIED.

NORRIS, Circuit Judge, dissenting:

I am troubled by Judge Schroeder's opinion in this obviously important case. While it may be that *Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration*, 759 F.2d 684 (9th Cir.1985), forecloses appellants' claims that the BPA's Interim Access Policy arbitrarily favors the BPA itself and discriminates against Canadian utilities in violation of the statutory mandate,¹ that case does not foreclose a challenge to the BPA's policy of discriminating against Pacific Southwest utilities and

1. Parenthetically, it also seems to me that the panel in *Department of Water & Power* may have wrongly decided the Canadian issue. The exclusion of Canadian power, though arguably unobjectionable in its discrimination against Canadian producers, also discriminates against Southwest energy purchasers--intended beneficiaries of the intertie. That issue may be important enough to merit en banc consideration.

energy consumers in favor of Pacific Northwest utilities.

The BPA's pro rata allocation scheme for available intertie capacity — a scheme which if implemented by a private party would plainly violate the antitrust laws — paternalistically restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy offered for sale by privately-owned Northwest utilities. The interim access policy's interference with free market pricing simply creates a cartel for the Northwest utility companies in the sale of power to the Southwest.² The BPA's statutory mission, however, does not extend to acting as the guardian angel for Northwest utilities in their market relationship with Southwest utilities. If Northwest energy companies believe that the Southwest utilities are exercising some sort of unfair monopsony power, let them sue under the applicable antitrust laws. It is not the mission of the BPA to fight this battle for the Northwest utilities through the promulgation of a regionally biased access policy.

I can see no statutory authority under which the BPA is authorized to discriminate so clearly in favor of Northwest utilities and against Southwest utilities and energy users. Indeed, the relevant statutory language appears to point the other way. The anti-competitive,

2. To the extent that Northwest utilities are under no obligation to use their pro rata share of intertie access, the BPA's interim plan also acts as a restriction on output. Output restrictions, like restrictions on price competition, raise prices above the competitive market level. Thus, the interim access policy — suppressing both prices and output — is a double curse for Southwest utilities and energy consumers.

pro-Northwest utility slant of the pro rata intertie access plan seems plainly incompatible with the statutory language requiring that the BPA be "fair and non-discriminatory" in its treatment of *all* utilities, 16 U.S.C. §838d, as well as the clear understanding recognized in *Department of Water & Power* that the purpose of the intertie was to benefit both the Northwest and Southwest, 759 F.2d at 694.



APPENDIX B

APPENDIX B

DEPARTMENT OF WATER AND POWER
OF
the CITY OF LOS ANGELES, Petitioner

v.

BONNEVILLE POWER ADMINISTRATION,
Respondent.

No. 84-7618

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 16, 1985.

Decided April 24, 1985.

Before KILKENNY, GOODWIN and
SKOPIL, Circuit Judges.

GOODWIN, Circuit Judge.

The Department of Water and Power of the City of Los Angeles brings a direct appeal¹ challenging a

¹ The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h, makes this court a court of original jurisdiction for suits challenging BPA administrative actions. 16 U.S.C. § 839f(e)(5). Any "final actions and decisions . . . or the implementation of such final actions" taken pursuant to any of the four enabling statutes are subject to direct review by the Ninth Circuit. See *Forelaws on Board v. Johnson*, 743 F.2d 677, 679 (9th Cir.1985); *Central Lincoln Peoples' Utility District v.*

policy implemented by the Administrator of the Bonneville Power Administration [BPA] which allocates use of electricity transmission lines connecting the Pacific Northwest with California. Reviewing the regulation in light of the broad range of powers statutorily granted to the Administrator, we uphold the validity of the regulation.

This case asks whether, to what extent and for what reasons, BPA can exercise control over the marketing of electricity generated in the Pacific Northwest. Like many similar cases, this one involves a complex web of four federal statutes and a complex factual background.² The real issue here is whether the City of Los Angeles can purchase low-cost electricity from vendors in Canada and transmit that electricity at rates favorable to Los Angeles contrary to the pricing strategy of the Administrator.

The City of Los Angeles provides electricity to customers in and near Los Angeles. Bonneville Power Administration is a federal agency within the Department of Energy organized for three purposes: to produce electric power at the Bonneville Dam on the Columbia River, to market power produced from

Johnson, 735 F.2d 1101, 1108 (9th Cir.1984).

² The four federal statutes provide the statutory authority for electricity generation, regulation and marketing of electricity in the Pacific Northwest and for the marketing of Northwest electricity in the Pacific Southwest. Those statutes are the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§839-839h ["Northwest Power Act"], the Federal Columbia River Transmission System Act, 16 U.S.C. §§838-838k. ["Columbia River Act"], the Pacific Northwest Power Preference Act, 16 U.S.C. §§837-837h ["Preference Act"], and the Bonneville Project Act, 16 U.S.C. §§ [sic] 832-832l. ["Project Act"].

numerous dams on the Columbia River as part of the Federal Columbia River Power System, and to supervise distribution of power within and from the Pacific Northwest. BPA itself is subject to regulatory supervision by the Federal Energy Regulatory Commission. 16 U.S.C. §§ 839e(i)(6), 839e(k).

Producers of electricity in the Pacific Northwest are linked to producers and consumers of electricity in the Pacific Southwest through the Pacific Northwest-Pacific Southwest Intertie, a system of three high-voltage transmission lines.³ BPA owns and operates almost all of the lines north of the Oregon-California and Oregon-Nevada borders. South of Oregon, the lines are owned by a number of California utilities. The City owns 40 percent of one of those lines.

The purpose of the Intertie, established by Congress in the late 1960's, see Pub.L. No. 88-257, 77 Stat. 844 (1964); Pub.L. No. 88-511, 78 Stat. 682 (1965) (appropriations for construction of the Intertie), is to even out the peaks and troughs in the production and consumption of power between the Northwest and the Southwest. At certain times of year the Northwest produces more electricity than it can use and the Southwest experiences particularly heavy electricity consumption. At other times, the Northwest has heavy demand and the Southwest can produce surplus power. By allowing electricity to flow either north or south,

³ Although the Intertie was designed to link the Northwest with the Southwest, the system is being used largely by Northwest and California utilities. A new Intertie connection between the Northwest and Arizona is planned. See BPA, *Columbia River Power for the People: A History of Policies of the Bonneville Power Administration* 237-46 (1981).

each region can assist the other during times of heavy demand.⁴

BPA produces approximately half the hydroelectric power sold in the Pacific Northwest. The remainder is produced by 15 publicly-owned or investor-owned utilities. BPA and the other utilities store the generation capacity of hydroelectric energy as water, held behind dams with finite storage capacities. This means that the generation capacity is perishable, because limits to storage and replenishment depend upon reservoir capacity and river flows. As a result, a major responsibility of BPA is the management of water levels consistent with seasonal water flows and electricity demands.

The water management process is complicated because the seasonal periods of high and low river flow do not necessarily correspond to seasons of high and low electricity demand. In marketing hydroelectric

⁴ It is useful to think of the Intertie as a pipeline in which electricity flows. The electricity can flow in either direction: from Pacific Northwest producers to California consumers or from California producers to Northwest consumers. Like a pipe, the Intertie has a finite capacity for transmitting electricity flows. In recent years, the flow in the Intertie has been almost entirely from the Northwest to California. Heavy river volume and lower than projected electricity demand in the Northwest have resulted in consistent surpluses of Northwest electricity. Furthermore, the cost of Northwest hydroelectric power (the source of most Northwest electricity) historically has been less than the cost of thermal power produced in California, making it financially attractive for California utilities to purchase as much Northwest electricity as the Intertie can hold. See generally D.W. Meek, *Pacific Northwest Conservation for California: The Mutual Benefits of Long Term Cooperation*, 13 *Environmental Law* 841 (1983).

energy, BPA must distinguish between power which can be generated during periods of the lowest river flow and power which can be generated only during peak river flow. A distinction has arisen, therefore, between so-called firm power (which is always available) and so-called nonfirm or interruptible power (which is available only during peak river flows). See *ALCOA v. Central Lincoln Peoples' Util. Dist.*, ___ U.S. ___, 104 S.Ct. 2472, 2475, 81 L.Ed.2d 301 (1984).

Over the years, BPA has entered into numerous contracts for the sale of firm power, both within the Northwest and outside the region. BPA has had such a contract with the City. The City also buys nonfirm hydroelectric power from BPA from time to time as it is available and as the City has demanded for it. During times of electricity shortage, parties to firm power contracts receive priority over any nonfirm energy purchasers. See e.g. 16 U.S.C. § 837f; *ALCOA*, 104 S.Ct. at 2477-79.

In the sale of both firm and nonfirm power, BPA is statutorily required to give priority to purchasers within the Northwest, 16 U.S.C. § 837a, and to public bodies and cooperatives, 16 U.S.C. § 832c(a). Sale to utilities outside the region is limited to electricity "which would otherwise be wasted because of the lack of a market therefor in the Pacific Northwest at any established rate." 16 U.S.C. §§ 837(c), 837(d). This electricity is known as surplus power.

Sale of any power by a Northwest utility to a California utility, such as the City requires the transmission of that power to the California purchaser. The Intertie transmits this energy. But, because there are many purchasers of power and because seasonal availability may affect the amount of power which

utilities wish to transmit over the Intertie to California purchasers, BPA must allocate Intertie capacity among both purchasers and producers.

In allocating Intertie capacity among itself and other Northwest electricity producers, BPA is statutorily required to give itself preference. 16 U.S.C. § 837e. Any capacity in the Intertie "which is not required for the transmission of Federal energy . . . shall be made available as a carrier for transmission of other electric energy" *Id.*

When Northwest utilities must generate more electricity than they can possibly use in the Northwest (to avoid the wasteful spilling of water over their dams), the electricity so generated is sometimes not only too much to be used in the Northwest but also exceeds the capacity of the Intertie to transmit.

To allocate Intertie capacity for surplus power sales outside the region, BPA has entered into an agreement with Northwest utilities known as the Exportable Agreement.⁵ The Exportable Agreement allocates Intertie capacity among competing producers during times of potential spillover by permitting each Northwest utility to sell a pro rata portion of its surplus power to California purchasers and to transmit that power over the Intertie until Intertie capacity has been reached. When the Exportable Agreement triggers an allocation of scarce Intertie capacity, nonregional producers (*i.e.*, electricity producers in Canada) are precluded from using the Intertie. That

⁵ Agreement Executed by the United States of America Department of the Interior by and through the Bonneville Power Administrator and Utilities in the Pacific Northwest (BPA Contract No. 14-03-73155, January 13, 1969).

agreement was, until the policy which is the subject of this litigation, the only means of allocating Intertie capacity.

In the past, when river flows did not threaten a spillover condition, BPA did not regulate Intertie access. Instead, BPA allowed access to the Intertie (up to its maximum capacity) to both Northwest and Canadian utilities. Market forces determined how much energy each Northwest or Canadian utility could sell to purchasers in California. If Canadian utilities offered the most attractive price to California purchasers, for example, those utilities were permitted to use potentially all Intertie capacity, at the exclusion of Northwest utilities which were offering less attractive prices. Canadian producers as a group have been the second largest user of Intertie capacity, after BPA itself.

There are several different ways by which California utilities purchase Northwest power. The first, known as a bilateral purchase, is a spot-market purchase of electricity. After the seller and purchaser agree upon a price, quantity and duration, the energy is "wheeled" over the Intertie directly from the producer to the purchaser.⁶ Wheeling agreements provide a significant

⁶ Wheeling is the procedure by which the owner of transmission lines transmits electricity produced by another party for a specified charge. See M.C. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash.L.Rev. 175, 212-13 (1982). While the statutory authority for BPA wheeling originally was doubtful, wheeling has long been a BPA practice. See BPA, *Columbia River Power for the People: A History of Policies of the Bonneville Power Administration* 201-07 (1981); Columbia River Act, 16 U.S.C. § 838d.

percentage of the energy needs of some California utilities including the City.⁷

The second major power sale arrangement is the exchange agreement. An exchange agreement is a reservation by a purchaser to borrow electricity which is later returned to the producer. A purchaser reserves capacity on the Intertie to accommodate the electricity it needs to borrow (usually for peak daily usage), and reserves capacity to return the same amount of electricity at a later time (often the same day) when its own generation capacity is not being fully used. Because this energy transaction is used to accommodate peak electricity demands, the arrangement is known as a peaking return exchange agreement. The energy so transmitted is known as obligation energy. Because the Intertie can be used for transmitting electricity either to the north or to the south, the Intertie can be used for both ends of the transaction: the borrowing of electricity during peak times by California utilities and the return of electricity to Northwest utilities during California's off-peak hours.

The City and BPA have had a long-standing exchange agreement. Because market conditions in recent years have made Canadian power very attractive, however, the City has been satisfying its obligation to return borrowed energy by purchasing electricity from British Columbia Hydro Authority and having that electricity returned to BPA at the British

⁷ Such agreements help California utility entities avoid the cost of building expensive generating plants to accommodate demand which arises only during peak daily usage. Of course, Northwest utilities also benefit from the sale of electricity which might otherwise be wasted. See generally D.W. Meek, 13 Environmental Law 841.

Columbia — Washington border. Consequently, the Intertie has been used by the City to borrow BPA power but not to return the obligation energy. BPA and the City have an ongoing dispute over whether this arrangement is permissible under their exchange agreement.⁸ BPA has demanded that the City return obligation energy at the same location where it borrows it: the Oregon — Nevada border. If the City did return borrowed electricity in the manner demanded by BPA, Intertie capacity would be needed for both borrowed and return obligation energy meaning that less power could be transmitted from north to south on the Intertie.

BPA INTERTIE ACCESS POLICY: THIS DISPUTE

BPA is facing a potentially significant revenue shortfall in coming years which may jeopardize its ability to recover costs as is required by the Columbia River Act. See 16 U.S.C. § 838g(3). It is this threat which BPA cites as a primary reason for the policy which is the subject of this litigation. The agency offers two explanations for this unanticipated revenue shortfall. First is a lower-than-expected demand for firm power from those industrial customers who purchase huge quantities of electricity directly from BPA. Many of these customers are large aluminum producers which have been affected by a depressed

⁸ The City has sued the federal government over the BPA interpretation of the exchange agreement. *Department of Water & Power of the City of Los Angeles v. United States*, No. 181-84C (U.S.Ct.Cl. pending). Each party has claimed the other to be in material breach of the exchange agreement.

aluminum market. *Cf. ALCOA*, 104 S.Ct. at 2478. Secondly, BPA has sold less than predicted amounts of surplus power to extraregional utilities. In part because of lower prices offered by Canadian vendors to California customers (including the City), the market has shrunk for BPA surplus power. *See Calif. Energy Resources Cons. and Develop. Comm'n v. BPA*, 754 F.2d 1470, 1472 (9th Cir.1985); *Portland Gen. Elec. Co. v. Johnson*, 754 F.2d 1475, 1477-78 (9th Cir.1985).

On September 7, 1984, BPA promulgated its Near Term Intertie Access Policy [IAP]. 49 *Fed.Reg.* 44,232-38 (November 5, 1984). The policy was adopted after a series of public hearings and *Federal Register* notices. 48 *Fed.Reg.* 33,515 (July 22, 1983) (notice of intent to develop policy on Intertie access); 49 *Fed.Reg.* 5,990 (Feb. 16, 1984) (comments on notice of intent); 49 *Fed.Reg.* 30,098 (July 13, 1984) (proposed Intertie Access Policy). *See generally* Near Term Intertie Access Policy: Administrator's Record of Decision (September 7, 1984). The policy is to remain in effect until May 1, 1985, at which time the agency will decide on a Long Term Intertie Policy. 50 *Fed.Reg.* 6,379 (Feb. 15, 1985) (extending expiration date from March 1 to May 1, 1985).

While the IAP sets out three different allocation formulae for different market and electricity supply conditions, several assumptions underlie all three formulae. Priority in access to the Intertie is always afforded to Northwest electricity suppliers selling firm power to California purchasers. IAP ¶ D.1, 49 *Fed.Reg.* at 44236. The IAP assures delivery of power for existing firm power contracts, IAP ¶ D.1.a., and allows those Northwest utilities capable of doing so to enter into additional firm power contracts with California

utilities. IAP ¶ D.1.b. Among those contracts which will be afforded assured delivery are exchange agreements including that between BPA and the City. Only after firm power contracts are satisfied will BPA allocate Intertie access for movement of nonfirm power. IAP ¶ D.2. Canadian utilities can never use the Intertie to transmit firm power. IAP ¶ E.

Once firm power contracts are satisfied, formulae for allocation of Intertie capacity for nonfirm energy depend upon supply and demand under three different conditions.

Condition 1 applies when there is a surplus of Northwest electricity and Northwest utilities are willing to sell electricity to California purchasers at a BPA-established rate. This portion of the IAP does not change existing BPA policy; it incorporates the terms of the Exportable Agreement. IAP ¶ D.2.b.(1). The City does not challenge this formula.

Condition 3 is the opposite of Condition 1. IAP ¶ D.2.b.(3). This formula applies when: (1) demand for Intertie use among Northwest utilities is less than available Intertie capacity, and (2) California utilities want to purchase more electricity than Northwest utilities have available to sell but the amount available will not fill the Intertie to capacity. Under this condition, BPA makes Intertie transmission capacity freely available to any Northwest or Canadian utility desiring access. The City does not challenge this formula.

The text of the Condition 2 formula appears in the margin.⁹ Condition 2 applies when there is a slight

⁹ (2) *Condition 2.* When the Exportable Agreement allocation formula is not in effect, but BPA and other Scheduling Utilities

oversupply of Northwest electricity but not such an extreme oversupply that Northwest utilities must generate excess electricity to avoid spilling water over their dams. IAP ¶ D.2.b.(2). In this situation (when California utilities are willing to purchase, and Northwest utilities are willing to sell, more electricity than the Intertie can handle), there is competition among Northwest utilities. Canadian utilities may not use the Intertie to enter the competition unless those utilities first enter into acceptable planning agreements with BPA. IAP ¶ E.3. No Canadian utilities currently have acceptable agreements with BPA.

Under Condition 2, all Northwest utilities (and qualified Canadian utilities, if any) wishing to sell power would notify BPA of the amount of power available for sale each day. If the total available power is greater than Intertie capacity, each seller (including BPA) is allocated a share of Intertie capacity based

declare amounts of power available for access to the Pacific Intertie that exceed the available Intertie Capacity determined as described in paragraph a. above, the capacity will be allocated pursuant to the following procedure:

(a) On any day the Scheduling Utilities observe as a normal workday, each Scheduling Utility shall submit to BPA declarations of daily quantities of energy and hourly capacity it has available for sale to the Southwest for the period beginning at midnight of the day of declaration and continuing through midnight of the next normal workday.

(b) Allocations for each hour among Scheduling Utilities will be determined and will approximate the ratio of each Scheduling Utility's declaration to the sum of all declarations for each hour multiplied by the available Intertie Capacity

IAP ¶ D.2.b.(2), 49 *Fed.Reg.* at 44,237.

upon a pro rata reduction from its declared available electricity, just as it is under Condition 1. Allocations cannot be exceeded or traded even if a utility later discovers it requested too much or too little capacity.

The effect of Condition 2 is to reduce competition among Northwest utilities both for Intertie capacity and for California purchasers and to equalize the prices at which Northwest power can be sold. The question on which this litigation turns is whether the Condition 2 restrictions are consistent with BPA's statutory authority.

One related issue also has been raised in this litigation. The City challenges the formula by which the IAP calculates Intertie capacity for the purpose of allocating access under Condition 2. Instead of allocating physical Intertie capacity, BPA allocates net scheduled Intertie capacity. IAP ¶ A.8. Scheduled Intertie capacity is a measure not of physical capacity but of "capacity . . . controlled . . . through ownership or contract right." That capacity includes the amount of any return electricity which California utilities are obligated to return to Northwest utilities pursuant to peaking return exchange agreements. *Id.* Because peaking return exchange agreements permit the utilities to use the Intertie, the BPA definition presumes that all electricity transactions as part of those agreements use the Intertie.

The scheduled capacity would be, therefore, larger than the physical capacity of the line if all parties to exchange agreements actually used the Intertie to return their obligation energy. But some utilities do not use the Intertie to satisfy their return obligations. The City, for example, satisfies its obligations by purchasing from British Columbia Hydro Authority electricity

which is delivered to BPA without passing through the Intertie. Other utilities may purchase electricity from one Northwest utility and have that electricity transmitted to another Northwest utility to satisfy peaking return obligations. That energy, also, does not pass through the Intertie. Because scheduled capacity allocates capacity which need never be physically used, the City argues that it is arbitrary and capricious for BPA to use scheduled rather than actual capacity to allocate Intertie access.

THIS COURT'S REVIEW

This detailed history provides the background for our analysis of the case at bar. The City asks this court to find that the IAP exceeds BPA's statutory authority and is arbitrary and capricious. Under the Administrative Procedure Act, this court may set aside an agency action if it is found to be arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. 5 U.S.C. § 706(2). This standard of review is highly deferential and assumes the agency action to be valid. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d. 136 (1971). Insofar as agency action is the result of its interpretation of organic statutes, the agency's interpretation is to be given great weight. *ALCOA*, 104 S.Ct. at 2479-80 (discussing BPA administrative actions).

In reviewing actions BPA takes under its enabling legislation, this court gives substantial deference to the agency for three reasons. First, the enabling legislation is highly technical and complex. Second, the agency was intimately involved in the drafting and consideration of the legislation at the time of its passage. *ALCOA*, 104 S.Ct. at 2480. Finally, Congress has, for

nearly half a century, monitored BPA performance in electricity regulation and allocation. Statutory interpretations offered by BPA represent “contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.” *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). See *Central Lincoln Peoples’ Util. Dist. v. Johnson*, 686 F.2d 708, 710-11 (9th Cir.1982), *rev’d on other grounds*, — U.S. —, 104 S.Ct. 2472, 81 L.Ed.2d 301. See also *American Paper Inst. v. American Elec. Power Service Corp.*, 461 U.S. 402, 423, 103 S.Ct. 1921, 1933, 76 L.Ed.2d 22 (1983).

Nevertheless, in making this review, this court must determine whether the challenged decision was based upon a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park*, 401 U.S. at 416, 91 S.Ct. at 823. While this court may not substitute its judgement for that of the Bonneville Power Administrator, its factual inquiry is to be “searching and careful.” *Id.*

ALLOCATION OF INTERTIE CAPACITY¹⁰

We first examine the Administrator’s authority to allocate use of the Intertie. Each of the four applicable statutes imposes restraints upon the manner in which BPA may exercise its discretion in managing electricity

¹⁰ The City only challenges Intertie allocation under Condition 2. We therefore address only those restrictions which apply under that Condition.

and operating the Intertie. A review of applicable legislation reveals the boundaries of BPA authority.

The Project Act authorizes and directs BPA to construct, operate and maintain the Intertie for transmitting federal energy. 16 U.S.C. § 832a(b). The Act makes no reference to sharing these facilities with other electricity producers. Preference in BPA sale of electricity is to be accorded to public bodies. 16 U.S.C. § 832c(a). Consequently, allocation of Intertie use is not inconsistent with BPA's statutory authority to use the federally-owned portions of the Intertie in any manner consistent with "transmitting electric energy, . . . from [BPA] to existing and potential markets" 16 U.S.C. § 832a(b).

The Preference Act was passed at the time the Intertie plan was considered and approved. See Pub.L. No. 88-257, 77 Stat. 844 (1964); Pub.L. No. 88-511, 78 Stat. 682 (1965) (appropriations for construction of the Intertie). The purpose of the Act was, *inter alia*, to permit interconnection of the Bonneville power system with the systems of other regions without the risk that BPA's customers in the Pacific Northwest would lose their preference for electricity needed to meet present and future needs. H.R.Rep. No. 590, 88th Cong., 2d. Sess., reprinted in 1964 U.S.Code Cong. & Ad. News 3342, 3342-43 (1964). Congress was concerned to ensure that this interconnection, so vital to the economic interests of both the Northwest and the Southwest, was not made at the expense of the lowcost electricity needed to support economic growth in the Northwest. *Id.* at 3342-44. At the same time that Congress recognized the availability of electricity surplus to the needs of the Northwest, it also recognized the temptation for consumers elsewhere in

the West to use this cheap power for their own economic development at the expense of the Northwest. *Id.* at 3343-44.

The Act establishes a preference both for electricity sales, 16 U.S.C. § 837a, and for use of Intertie capacity to transmit that electricity. 16 U.S.C. § 837e. This is also the statute which limits the sale, delivery or exchange of BPA electricity outside the Northwest to "surplus energy and surplus peaking capacity." 16 U.S.C. § 837a. Surplus energy is defined to be that energy which would otherwise be wasted because of the lack of a market in the Northwest. Surplus peaking capacity is that peaking capacity for which there is no demand in the Northwest at any established rate. 16 U.S.C. § 837(c), (d).

Transmission lines used for BPA energy in the Northwest are to be made available to other users if not needed by BPA. 16 U.S.C. § 837e. The legislative history of the Act explains that

In determining the existence of capacity excess to the needs of the Government, Federal needs reasonably foreseeable may be included, but the Secretary may not decline to enter into [agreements to transmit other utilities' power] merely because he may have energy available for sale to serve the same load.

H.R.Rep. No. 590; 1964 U.S.Code Cong. & Ad.News at 3350. BPA is permitted, therefore, to reserve sufficient Intertie capacity not only for its current needs but also for its "foreseeable" future needs, so long as the agency does not compete with other utilities on the mere speculation that it "may have energy available" sometime in the future to sell to the same customer.

Underlying Congressional passage of the Preference Act was its concern to ensure that BPA could repay the huge federal debt incurred in constructing Northwest hydroelectric facilities. See 1964 U.S.Code Cong. & Ad.News at 3382 (Additional views of Rep. Craig Hosmer). In its statement of the need for the Preference Act, the House Committee explained that construction of the Intertie would permit BPA to raise additional revenue which "would go a long way toward putting the Bonneville power system back on a sound financial basis." H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3343.

The City has argued that the IAP violates the Preference Act, 16 U.S.C. § 837e, by automatically giving BPA priority in sale of electricity to California regardless of market price and competition from other Northwest electricity producers. Nevertheless, it is clear from the legislative history that Congress did not intend BPA to compete with other Northwest utilities for access to the Intertie. The theme of the Act is that BPA, as owner and operator of the Intertie, should be allowed preference in transmission of its electricity over the Intertie as necessary to meet its statutory mandate of being self-financing. Only if the agency still has capacity remaining on the Intertie after it has sold available and foreseeable power, is it required to make the Intertie available to other utilities.

The Columbia River Act deals primarily with financing arrangements for BPA. The Act does, however, require BPA to make its facilities available to all utilities fairly once its own needs are satisfied:

The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the [Intertie] which he

determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

16 U.S.C. § 838d.

Neither the Act nor the Congressional Report provide any further guidance for the Administrator's discretion in making excess capacity available to other utilities. The Act recognizes, however, that BPA must make available only excess capacity, not all Intertie capacity.

The Northwest Power Act reaffirms the authority of BPA to allocate and manage Intertie capacity. 16 U.S.C. § 839f(i)(1)(B). BPA is explicitly limited to providing transmission services over the Intertie which are "not in conflict with the [BPA's] other marketing obligations," *id.*, and which do not cause a "substantial interference with [the BPA] power marketing program" 16 U.S.C. § 839f(i)(3).¹¹ See H.R.Rep. No. 976, Part II, 96th Cong.2d Sess., *reprinted in* 1980 U.S.Code Cong. & Ad.News 5989, 6054.

The City argues that the IAP alters free market forces which would otherwise allocate Intertie access according to price and demand. The City's argument, however, fails because electricity generation, transmission and distribution in the Pacific Northwest have not been subject to free market forces since passage in 1937 of the Project Act which created a virtual federal monopoly over transmission of hydroelectric energy in the region. Notwithstanding the fact that BPA has permitted the operation of market forces to allocate Intertie usage at some times in the past, Congress has

¹¹ The IAP was likewise designed to "enhance BPA's power marketing program." 49 *Fed.Reg.* at 44233.

repeatedly expressed its intent that BPA control sale and transmission of power in the Northwest consistent with Congressional statements of policy. See H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3342-44; H.R.Rep. No. 976, Part I, 96th Cong., 2d Sess., 1980 U.S.Code Cong. & Ad.News at 5989-93.¹²

The history of BPA's enabling legislation further demonstrates that Congress has repeatedly required BPA to operate in a manner which assures that the agency is fiscally self supporting. See 16 U.S.C. § 832f (BPA rate schedules designed to recover BPA costs) H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3343 (statute designed to put BPA back on sound financial ground); 16 U.S.C. § 838g(2) (rate schedules to be based upon BPA need to recover operating and capital costs); 16 U.S.C. § 839e(a)(1) (rates to be designed consistent with sound business principles and with need to recover BPA costs); H.R.Rep. No. 976, Part I, 1980 U.S.Code Cong. & Ad.News at 6001 (BPA must be self supporting and must maintain financial independence subject to Congressional oversight). While market forces at times in the past may not have threatened BPA's Congressional mandate, BPA has presented reliable evidence that without a policy which carefully allocates Intertie access, it will experience significant revenue shortfalls in coming years. To the extent that the IAP is designed to mitigate projected deficits, therefore, the policy is not only statutorily authorized but statutorily mandated. *Calif. Energy*

¹² The City argues that, by displacing competition, the IAP violates the antitrust laws. That argument is frivolous because the antitrust laws do not apply to the federal government. See *Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C.Cir. 1981).

Resources, 754 F.2d at 1472; *Portland Gen. Elec. Co.*, 754 F.2d at 1477-78.

These four statutes show repeated Congressional insistence that BPA have preference in using Intertie capacity and that, so long as the agency is fair and nondiscriminatory, BPA have the discretion to allocate remaining transmission capacity. Under this court's narrow review, the IAP is neither arbitrary and capricious, nor an abuse of discretion nor in contravention of statutory authority. This court need not find that the BPA interpretation of the four statutes " 'is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' We need only conclude that it is a reasonable interpretation." *ALCOA*, 104 S.Ct. at 2480, quoting, *American Paper Inst.* 461 U.S. at 423, 103 S.Ct. at 1933.¹³

EXCLUSION OF CANADIAN POWER

The City argues that the IAP violates BPA's statutory mandate to provide Intertie access to power generated in Canada. 16 U.S.C. § 837e. See H.R.Rep. No. 590, 1964 U.S.Code Cong. Ad.News [sic] at 3350 (Canadian energy "stands on the same basis as any

¹³ The legislative scheme is confusing and overlapping. It is not at all clear that Congress considered all the ramifications of the language used in different enactments since the Project Act was enacted in 1937. Nevertheless, statutes dealing with the same subject must be read together and harmonized where possible. See 2A *Sutherland on Statutory Construction* § 52.02. The BPA policy is not inconsistent with the legislative scheme and is not an abuse of discretion.

other non-Federal energy"); 16 U.S.C. § 838d (capacity must be made available on a fair and nondiscriminatory basis). The IAP currently prohibits Intertie access for Canadian power under Conditions 1 and 2.¹⁴

There are two types of Canadian power for which Intertie access could be provided. The first is Canadian treaty power, *see* 16 U.S.C. § 837h, which is firm power generated in the Northwest as a result of water flows from dams on Canadian rivers. Columbia River Basin Treaty, 15 U.S.T. 1555, TIAS No. 5638 (Jan. 17, 1961). *See* M.C. Blumm, 58 Wash.L.Rev. at 215-19; BPA, *Columbia River Power for the People: A History of Policies of the Bonneville Power Administration* 227-36 (1981). Firm treaty power is not affected by this litigation.¹⁵ BPA is obligated to afford preference to firm treaty power. 16 U.S.C. §§ 837e, 837h.

The second type of power is nontreaty surplus power which Canadian utilities (particularly B.C. Hydro) sell to California utilities and which is wheeled to those

¹⁴ Access by Canadian utilities under Condition 2 is dependent upon those utilities' "participation in the Pacific Northwest's coordinated planning and operation to a greater extent than in the past, or agreement to provide other appropriate consideration of value to the Pacific Northwest." IAP ¶ E.3, 49 *Fed.Reg.* 44237. This clause is entirely consistent with the environmental planning concerns expressed in the Northwest Power Act. *See* 16 U.S.C. § 839b. As we have already noted, negotiations to enter into such an agreement have not been successful.

¹⁵ Because Canada did not need the power to which it was entitled under the Treaty, treaty power was sold back to BPA under the Canadian Storage Power Exchange. BPA sold this firm power to California utilities. The last remaining contract for the sale of this power to California utilities expired two years ago. *See* D.W. Meek 13 *Env'tl L.* at 894-96.

purchasers over the Intertie. Surplus power does not enjoy any preference at all. The agency:

may enter into agreements for the wheeling of energy generated in Canada, but such energy . . . does not have the priority granted to Federal energy and Canada's entitlement to [treaty] power benefits

H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3350 (emphasis added). That statement is in contrast to the immediately prior paragraph in the legislative history which *requires* BPA to make excess Intertie capacity available to other non-Federal utilities.

The legislative history of both the Preference Act and the Columbia River Act demonstrates that Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit of Canadian utilities. *Cf.* 16 U.S.C. § 838d (excess intertie capacity to be made available on a fair and nondiscriminatory basis); H.R.Rep. 93-1375, 93d Cong.2d Sess., *reprinted in*, 1974 U.S.Code Cong. & Ad.News 5810, 5814 (section 838d "is not intended to represent a policy having application other than in the Pacific Northwest"). While Canadian treaty power is to be accorded preference in Intertie allocation, nontreaty power is given nonpreference Intertie access, only once BPA chooses to exercise its authority to enter into wheeling agreements. The legislative history indicated no Congressional mandate that BPA must enter into such agreement. *See* H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3350. *See generally* U.S. Dep't of the Interior, Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric

Interties Between the Pacific Northwest and Pacific Southwest, at X, 2, 33-34 (1964) (discussing allowing Intertie access for Canadian treaty power without any reference to other Canadian power sales).

ALLOCATION OF SCHEDULED CAPACITY

Instead of allocating physical Intertie capacity, the IAP allocated contractual electricity flow, known as scheduled capacity. The agency's use of scheduled capacity is based on the agency's conclusion that the scarce commodity being allocated is not physical Intertie capacity but interregional energy exchange between California and the Northwest. Because of exchange agreements, electricity is transmitted both into and out from both regions. Consequently, the IAP allocates the sum total of all energy exchange, whether or not the energy is physically transmitted over the Intertie. This enables BPA to coordinate scheduling of Intertie access so that purchases and sales between utilities can be offset against each other. Allocation of scheduled capacity is apparently an established industry practice designed to promote equitable cost sharing and efficient planning. Evidence presented by BPA suggests that this is a more efficient use of the Intertie than is allocation according to physical capacity.¹⁶

¹⁶ The agency has presented evidence to show that, in the last five months of 1984 (including four months in which the IAP controlled Intertie access), the Intertie was used to 93 per cent of its capacity. During a comparable period in 1983, the Intertie was used to 81 per cent of capacity. The BPA attributes this 12 per cent increase in Intertie usage to more efficient allocation of capacity

Although the City's objections to the use of scheduled capacity as unwise may have some validity, a court is not the proper forum in which to address such extremely technical, discretionary issues. Scheduling transmission service capacity is a highly technical field. Congress has consistently committed broad discretion to BPA. This court does not substitute its judgment for that of the administrative agency in technical fields within the agency's unique expertise. *ALCOA*, 104 S.Ct. at 2480; *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387 (9th Cir.1984). See *Cincinnati Gas & Elec. Co. v. FERC*, 724 F.2d 550, 554 (6th Cir.1984).

CONCLUSION

The four BPA enabling statutes must be read in *para materia*. Two common themes appear clear from these statutes. The first is that BPA is required to market federal power in a manner which ensures that the agency is self-supporting. Secondly, BPA is required to allocate use of federally-owned transmission facilities in a manner which accords preference first to transmission of federal power and then to transmission of other Northwest-generated power. Once such preferences are accommodated, the agency is prohibited from denying access to the Intertie by other extraregional utilities within the United States. BPA is permitted, but not required, to enter into wheeling agreements to transmit Canadian-generated power.

Recognizing these common themes, we find that the IAP is consistent with BPA statutory authority and is not an arbitrary and capricious exercise of its

discretion. Accordingly, we uphold the validity of the Near Term Intertie Access Policy.

APPENDIX C



APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA)	Nos. 84-7836,
ENERGY RESOURCES)	85-7430
CONSERVATION and)	
DEVELOPMENT)	
COMMISSION,)	
)	
<i>Petitioner,</i>)	
)	
vs.)	
)	
BONNEVILLE)	
POWER)	
ADMINISTRATION;)	
JAMES J. JURA,)	
as Administrator*;)	
and JOHN S. HERRING-)	
TON, as Secretary of the)	
Department of Energy of)	
the United States of)	
America,)	
)	
<i>Respondents.</i>)	
)	

* James J. Jura, the current Administrator of the Bonneville Power Administration, is substituted for his predecessor in office pursuant to Fed. R. App. P. 43(c)(1).

PUBLIC UTILITIES)	Nos. 84-7838,
COMMISSION of the)	85-7470
STATE OF)	
CALIFORNIA)	
)	
vs.)	
)	
JAMES J. JURA,)	ORDER
as Administrator of)	
the Bonneville Power)	
Administration*; JOHN)	
S. HERRINGTON,)	
as Secretary of of [sic])	
the Department of Energy))	
of the United States)	
of America; and the)	
UNITED STATES)	
OF AMERICA,)	
)	
<i>Respondents.</i>)	
)	

Before: TANG, SCHROEDER, and NORRIS, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed February 4, 1988]

APPENDIX D



APPENDIX D

[BONNEVILLE POWER ADMINISTRATION]

NEAR TERM INTERTIE ACCESS POLICY

[49 Federal Register 44232]
[Monday, November 5, 1984]

....

I. Background

A. *Policy Development Process to Date*

The development of BPA's Intertie Access Policy has been an extensive process. It commenced on July 22, 1983, with publication in the **Federal Register** of a Notice of Intent to Develop Intertie Policy (48 FR 33515). This notice was provided consistent with BPA's "Major Power Marketing Policy Procedures" (May 12, 1981, 46 FR 26368). In response to that notice, BPA met with numerous organizations and interest groups to identify, discuss, and seek advice on the issues that must be resolved by an access policy. BPA received 55 comments in response to the July 22 notice. These comments and advice generated a Discussion Paper that was published in the **Federal Register** on February 16, 1984, with a request for comments from the public (49 FR 5990). This Discussion Paper described possible BPA policies for use of the Pacific Intertie by BPA and others within existing contractual obligations. BPa [sic] received 76 written comments in response to the Discussion Paper and held informal meetings with customer and public interest groups.

The Administrator considered the comments on the Discussion Paper in the context of BPA's own efforts to resolve basic access priority issues given the current Pacific Northwest power surplus of firm and nonfirm power. The Administrator concluded that a multi-staged policy development was appropriate. This Near Term Intertie Access Policy is the first stage of that policy development.

B. Record of Decision Available

BPA has prepared a Record of Decision evaluating the record of the proposed Near Term Intertie Access Policy and the Administrator's decisions on the issues identified with the record. This Record of Decision is available on request from BPA at the locations listed in the addresses section of this notice.

This document presents BPA's evaluation of the record of the proposed Near Term Intertie Access Policy and the Administrator's decisions on the issues identified within the record. The record on which this Record of Decision is based consists of the comments received on BPA's proposed policy issued on July 13, 1984, and published in the **Federal Register** on July 30, 1984 (49 FR 30098); the comments made at the public comment forums; any previous comments specifically incorporated by reference by the commenters; and related documents.

The Record of Decision is divided into four major sections: (1) Introduction, addressing the purpose of the Policy, the process used to develop the Policy, and BPA's legal authorities to implement the Policy; (2) Preliminary issues, describing the context of the Policy within BPA's other actions and responsibilities and the

pervasive concepts embodied within the Policy; (3) Conditions for Access, describing the overall standards the Policy applies to determine whether access to the Intertie will be provided for a particular resource or arrangement; and (4) Firm Contracts and Formula Allocation Methods, discussing the specific operative elements of the Policy that are necessary to allocate access to the Pacific Intertie. Within each section, the appropriate comments are grouped by topic into issues. The issues are divided into three sections: (1) A summary of comments on the issue; (2) an evaluation of the comments that discusses the various arguments on the issue and BPA's evaluation of those arguments; and (3) the decision that explains the Administrator's decision on the issue as reflected in the Policy as adopted.

C. Process Remaining

The initial Near Term Intertie Access Policy is in effect for approximately 6 months. During this 6-month period, environmental analyses of the Policy will be conducted and operational experience with the Policy will be gained. Further opportunities for public comment on proposed revisions to the initial Policy also will be provided. Based on these comments, the results of the environmental analyses and the operating experience, the Near Term Policy may be revised at the end of the 6-month period. The revised Policy then will be adopted for the remaining approximately 18 months. The Near Term Policy will be followed by a Long Term Intertie Access Policy.

The Long Term Intertie Access Policy is necessary because separate questions are raised regarding the interrelationship of Intertie access priorities to long

term firm power transaction, to new Intertie facilities development, and to new resource development. These longer term questions require consideration of different issues and involve different potential impacts. These issues militate for additional features of an access policy and require additional policy development. The Near Term Intertie Access Policy by comparison, will resolve immediate, more discrete access issues that result from the present power surplus.

BPA expects to commence scoping an environmental analysis of the Long Term Policy during the Fall of 1984. BPA anticipates that, because of possible implications for future resource development, the Long Term Intertie Access Policy may require an environmental impact statement. The environmental statement could take as long as 2 years to complete.

II. Discussion

A. *Reason for Action*

BPA adopts this Near Term Intertie Access Policy in order to enhance BPA's power marketing program and to provide certainty with respect to firm and nonfirm transactions which may occur on the Federally owned portions of the Pacific Intertie. Specifically, BPA's policy accomplishes several important purposes. First, BPA's Policy assures that BPA has use of its portion of the Pacific Intertie as necessary for BPA's power marketing program. Second, BPA must consider the financial impacts of Pacific Intertie usage on BPA's ability to recover adequate revenues. In this regard, BPA's Policy enhances BPA's ability to recover revenue that otherwise would be lost if BPA failed to

manage prudently its portion of the Pacific Intertie. Third, BPA's Policy responds to the recent influx of requests for more space on the Pacific Intertie than there is available capacity. BPA's Policy fosters increased certainty in power sales between BPA, Pacific Northwest utilities, and Pacific Southwest utilities.

1. Power Marketing Program

BPA faces various marketing and operating constraints, including firm load requirements, limited intertie capacity, Pacific Northwest Coordination Agreement requirements, Exportable Agreement requirements, and various nonpower requirements for flood control, flows for fish enhancement, and the like. Within these constraints, BPA seeks to achieve the production and marketing of an optimal amount of firm and nonfirm energy. The Pacific Intertie plays a key role in BPA's power marketing program. BPA's ability to market its firm and nonfirm energy over the Pacific Intertie has a direct relation to BPA's fiscal integrity.

Among the most important reasons Congress authorized construction of the Pacific Intertie are the following: (1) the Pacific Northwest could sell surplus energy to the [sic] Pacific Southwest in order to raise revenues and displace more expensive Pacific Southwest energy; (2) each region could help the other to meet peak loads; (3) Pacific Southwest energy could be used to firm up Pacific Northwest power; and (4) a market for surplus hydro peaking capacity of Federal Pacific Northwest dams could be developed. Pacific Intertie planners were also aware that uses of the Pacific Intertie would vary over the years and that the requirements of the Government could not be set forth

in complete detail with exact figures during hearings on intertie authorization. Congress did anticipate, however, that the benefits of the Pacific Intertie would be shared approximately equally between the Pacific Northwest and the Pacific Southwest.

2. Revenue Impacts

BPA is a self-financed Federal agency, and as such is required to raise sufficient revenues through rates charged for power and transmission services to pay all of its costs, including the amortization of the large Federal investment in the Federal Columbia River Power System (FCRPS). One of the major criteria by which Congress measured the desirability of the Pacific Intertie was that BPA would receive substantial revenue from the sale and exchange of surplus capacity and energy in order to keep BPA rates low. Consequently, Pacific Northwest consumers would benefit by having some system costs recovered from sales that otherwise could not be made.

BPA's market in California primarily serves to displace expensive oil and gas fired generation. Recently, this displacement has occurred predominantly in the form of economy energy transactions involving Pacific Southwest purchases of Pacific Northwest energy under nonfirm energy rate schedules. In economy energy transactions, the buyer obtains less expensive energy from another utility instead of operating its own resource. Economy energy transactions increase the operating efficiency of both buyer and seller systems. The buyer can reduce costs of generation. The seller obtains revenues from capacity that otherwise would have been unproductive. Consequently, Pacific Southwest consumers benefit from the savings that result when lower cost Pacific Northwest

energy is substituted for higher cost thermal generation.

The distribution of benefits in an economy energy transaction is measured by comparing the money saved by the purchaser with the revenues received by the seller. The goal in such transactions is to share equitably the benefits. A comparison of the Pacific Southwest savings with the revenues received by BPA demonstrates that recently there has not been an equitable sharing of economy energy benefits. BPA has been selling economy energy at rates well below its nonfirm energy Standard Rate and at a fraction of the decremental costs of Pacific Southwest utilities. As a result, rates to all other Federal power users have been higher.

In addition to a supply of nonfirm energy, BPA presently has firm resources surplus to BPA's existing firm loads. Some Pacific Northwest utilities are in a similar surplus condition. Both BPA and other Pacific Northwest utilities are seeking ways to market their surplus firm resources under long term sales agreements. To the extent BPA is unsuccessful in its efforts, the output of these resources is often sold under nonfirm energy rate schedules which fail to recover the full costs of these resources. Again, the result is that rates to all other Federal power users have been higher.

3. Demand for Firm Intertie Access

Currently, there is more demand for use of the Pacific Intertie than ever before, not just by BPA, but by other Pacific Northwest utilities and nonutility developers. There is much more energy available for sale to the Southwest than Pacific Intertie capacity.

This energy is available for sale on both a nonfirm and firm basis. It has become necessary, because of

competing and increasing demand for use of the Pacific Intertie, for BPA to develop an [sic] Pacific Access Policy. The Policy will provide the basis for predictable business transactions. Absent this predictability, BPA risks substantial interference with its power marketing program, and it will become increasingly difficult for the Pacific Northwest to market its surplus to the Pacific Southwest on a firm basis. BPA is now adopting a Near Term Intertie Access Policy that will serve the needs of BPA's own power marketing program and the needs of Pacific Northwest and Pacific Southwest utilities.

B. Overview of Policy

Under the Near Term Intertie Access Policy, BPA will provide near term intertie access to other Pacific Northwest scheduling utilities while retaining the necessary right to make use of the Pacific Intertie to implement BPA's Power Marketing Program. BPA will accomplish these tasks by: (1) Providing for uses of the Pacific Intertie necessary to implement agreements in support of BPA's Power Marketing Program and operational needs; (2) providing for assured delivery of qualifying firm sales by BPA or other Pacific Northwest utilities; and (3) allocating access to remaining Pacific Intertie capacity among BPA and other utilities.

Both existing and new contracts for the sale of firm power from existing Pacific Northwest resources may qualify for assured delivery. Nonfirm intertie access may be provided for extraregional resources and utilities when Pacific Northwest supply does not meet or exceed Pacific Intertie capacity.

Certain considerations are integral to the near term Policy. Of particular concern are: (1) The relationship between the Policy and the BPA's Power Marketing Program; (2) assured delivery for qualifying existing and new contracts; (3) treatment of extraregional resources, and (4) fish and wildlife provisions. Each of these considerations is briefly addressed below. A more complete explanation of these considerations is provided in the Record of Decision.

1. Relationship to Administrator's Power Marketing Program

The Policy assures that Pacific Northwest utilities obtain fair and equitable access to the Pacific Intertie without significant adverse impact on BPA's power marketing program. The Policy also assures that BPA has access to a portion of its own intertie capacity on a continuing basis. BPA can then make economy energy sales to the Southwest at reasonable prices. If BPA can have a reasonable expectation of selling its firm surplus and nonfirm energy at established rates, its power marketing program will experience minimal interference.

2. Assured Delivery for Qualifying Existing and New Firm Contracts

The Policy will provide assured delivery for existing and new firm contracts. The criteria for qualifying firm contracts are intended to limit the availability of assured delivery to those sales that are not merely advance arrangements to purchase economy energy and that do not adversely impact the Administrator's obligation to operate in a prudent utility manner.

3. Treatment of Extraregional Resources

This Near Term Intertie Access Policy provides priority intertie access to utilities in the Pacific Northwest. During periods when intertie capacity is insufficient to meet all Pacific Northwest requests for capacity, the Pacific Intertie will be allocated only among Pacific Northwest utilities. Under such circumstances, if the Exportable Agreement in [sic] not in effect, BPA may, by contract, provide extraregional utilities limited Intertie access. Such access, however, would be conditioned either on such utilities' participation in the Pacific Northwest's coordinated planning and operation to a greater extent than in the past or on agreement to provide other appropriate consideration of value to the Pacific Northwest. During periods when the capacity of the Intertie is greater than the requests from Pacific Northwest utilities, Intertie capacity in excess of the need to serve Pacific Northwest utilities will be made available to transmit energy from extraregional resources.

4. Fish and Wildlife Provisions

The fish and wildlife provisions contained in the Near Term Intertie Access Policy are intended to assure that the Policy will neither enable nor encourage resource construction or operation that would decrease the effectiveness of or increase the need for expenditures or other actions by the Administrator to protect, mitigate and enhance fish and wildlife. These provisions provide a means to mitigate any adverse effects to the Administrator's efforts on behalf of fish and wildlife which might result from the operation of resources scheduled on the Pacific Intertie.

II. [sic] Near Term Intertie Access Policy

A. *Definitions*

1. "Administrator" means the Administrator of BPA and is used interchangeably herein with BPA.

2. "Administrator's Power Marketing Program, The" or "BPA's Power Marketing Program" means the aggregate of BPA's power marketing actions taken and policies developed to fulfill BPA's statutory obligations and policy directives. These action and policies are based on the exercise of broad authority to act, consistent with sound business principles, to recover adequate revenue to repay the Federal investment in the Federal system while, at the same time, encouraging the widest possible diversified use of electric power at the lowest possible rates for BPA customers. BPA's Power Marketing Program includes the Administrator's obligation to meet his power supply obligations in the Pacific Northwest and to market surplus power in the Pacific Northwest in a manner that assures an adequate, reliable, economical, efficient, and environmentally acceptable power supply, while preserving regional and public preference to Federal electric power, and maintaining BPA's present and future rates to all customers at the lowest level possible consistent with sound business principles. BPA's Power Marketing Program also includes the Administrator's objectives to market surplus Federal power to the Southwest utilities at equitable prices under rates adopted pursuant to section 7(i) of the Pacific Northwest Power Act and to assist in the marketing of the region's surplus firm power to the Southwest.

3. "Assured Delivery" means Intertie transmission service provided by BPA under this policy that is only interruptible as a result of Uncontrollable Forces.

4. "BPA Resources" means Federal Columbia River Power System (FCRPS) hydroelectric projects; resources acquired by the Administrator under long term contracts in force on the effective date of enactment of the Pacific Northwest Power Act; Exchange Resources consisting of electric power purchased under section 5(c) of the Pacific Northwest Power Act; and resources acquired by the Administrator under contracts in force on the effective date of this Policy.

5. "Entity" means an owner of a resource other than a Scheduling Utility.

6. "Existing Extraregional Resources" are those resources located outside the Pacific Northwest which are operational on the effective date of this Policy, other than extraregional resources which qualify as Existing Pacific Northwest Resources.

7. "Existing Pacific Northwest Resources" means the regional resources of Pacific Northwest utilities that are operational on the effective date of this Policy, the extraregional resources of Pacific Northwest utilities dedicated to regional load on the effective date of this Policy, and the regional resources of other Pacific Northwest entities that are operational and for which relationships with Scheduling Utilities to serve regional load have been established on the effective date of this policy. Existing Pacific Northwest Resources do not include BPA Resources.

8. "Intertie Capacity" means transmission capacity on the Pacific Intertie controlled by BPA through ownership or contract right, increased by electric

power scheduled South to North and decreased by loop flow, outages, and other factors that reduce transmission capacity from North to South.

9. "Pacific Intertie" means the Pacific Northwest-Pacific Southwest Intertie that consists of three high-voltage transmission lines (two 500-kilovolt (kV) alternating current (ac) lines and one 800-kV direct current (dc) line) which extend from Oregon into California or Nevada and any additions thereto.

10. "Pacific Northwest" means, as defined in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839e [sic] (Pacific Northwest Power Act), the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River Drainage Basin, and any contiguous areas, not in excess of 75 air miles from the area referred to above, which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of the Pacific Northwest Power Act which has a distribution system from which it serves both within and without such region.

11. "Scheduling Utility" means BPA, those utilities that operate generation control areas within the Pacific Northwest, and those utilities within BPA's generation-control area that schedule with BPA and are designated as Computed Requirements customers.

12. "Substantial increase" or "substantial decrease," or "substantially interfere" means a change that is of qualitative significance, or significant measurable effect, and of sufficient magnitude to require remedial action.

13. "Uncontrollable Forces" are defined in General Wheeling Provisions, GWP Form-4R.

B. *Term*

This Policy is effective on September 7, 1984, and will terminate on March 1, 1985, unless extended by published notice. Scheduling pursuant to this Policy shall commence on the date specified in a written notice from BPA to other Scheduling Utilities.

C. *Conditions for Intertie Access*

1. The Administrator will provide Assured Delivery or will allocate available Intertie Capacity to BPA and to other Scheduling Utilities pursuant to the conditions and procedures for scheduling and allocations set forth in this policy, unless otherwise provided by the terms of existing contracts listed in subsection D.1.a., below. An Entity that desires access to the Pacific Intertie may request access through the Scheduling Utility in whose control area the Entity's resource is located.

2. The Administrator will provide Assured Delivery or allocate available Intertie Capacity only for power from BPA Resources and Existing Pacific Northwest Resources, except to the extent that Existing Extraregional Resources are permitted access under this Policy.

3. Subject to reserving Intertie Capacity otherwise required by the Administrator to support his Power Marketing Program, the Administrator will provide Assured Delivery or allocate Intertie Capacity for an Existing Pacific Northwest Resource or an Existing

Extraregional Resource only when providing such Intertie access:

- a. Will not substantially interfere with:
 - (1) The Administrator's Power Marketing Program; or
 - (2) The operating limitations of the Federal system; and
- b. Will not conflict with:
 - (1) The Administrator's existing contractual obligations; or
 - (2) Any other legal obligations of the Administrator; and
- c. Will not result in scheduling of energy from resources whose operation will adversely impact fish and wildlife in a manner that results in a substantial decrease in the effectiveness of, or a substantial increase in the need for expenditures or other actions by the Administrator to protect, mitigate, or enhance fish and wildlife; or otherwise substantially interferes with the obligations of the Administrator under the Pacific Northwest Power Act to adequately protect, mitigate, or enhance fish and wildlife, including taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable the fish and wildlife program adopted by the Northwest Power Planning Council pursuant to the Pacific Northwest Power Act.

4. Operating limitations on the Federal Columbia River Power System (FCRPS), which includes the Federal power and transmission systems, result from

the Administrator's obligation to operate the FCRPS in an economical and reliable manner consistent with prudent utility practices. These operating limitations include, but are not limited to:

- a. The BPA Reliability Criteria and Standards;
- b. Western System's Coordinating Council (WSCC) Minimum Operating Reliability Criteria;
- c. North American Electric Reliability Council-Operating Committee Minimum Criteria for Operating Reliability;
- d. The limitations that result from the Administrator's coordination with other utilities and Federal agencies regarding resource and river operations.

5. The Administrator's existing contractual obligations include, but are not limited to:

- a. Current contracts numbered 14-03-73155, 14-03-55063, 14-03-56379, 14-03-79101, DE-MS79-81BP90185, DE-MS79-84BP91627, 14-03-54132, 14-03-53290, 14-03-53295, 14-03-50323, 14-03-54134, 14-03-53297, 14-03-58638, 14-03-54126. Section D below describes how BPA will implement its Assured Delivery and allocation procedures to avoid conflict with these contracts.

6. To verify consistency with this policy, upon the Administrator's request, Scheduling Utilities extraregional utilities that are requesting or have received Assured Delivery or a formula allocation, shall provide the Administrator with a list of resources that are to be operated or that were operated at such hours as access

to the Pacific Intertie will be or was provided, and such other information as the Administrator may reasonably need to implement the Policy. BPA will make such information available to the public to the extent it is not protected from disclosure by law.

7. Special provisions relating to fish and wildlife.

a. This Policy presumes that BPA Resources, Existing Pacific Northwest Resources, and Existing Extraregional Resources are being operated consistent with applicable licenses, permits, or other provisions of State and Federal law, and that the operation of these resources or providing access for these resources will not adversely impact fish and wildlife resources in a manner described in subsection C.3.c. (conditions for Intertie access), above, unless the Administrator determines otherwise.

b. Any interested person who wishes to challenge the presumption that an Existing Pacific Northwest Resource or Existing Extraregional Resource is being operated consistent with applicable licenses, permits, or other applicable provisions of State and Federal law must make that challenge with the State or Federal agency responsible for regulation of the resource or administration of that law.

c. Any interested person who wishes to challenge the presumption that the operation of an Existing Pacific Northwest Resource or Existing Extraregional Resources will not adversely impact fish and wildlife in the manner described in subsection C.3.c., above,

shall notify the Administrator in writing. The notification shall state the manner in which and the extent to which fish and wildlife are being adversely impacted. The Administrator will provide a copy of that notification to the Scheduling Utility, to any other owner or operator of the resource, and to State and Federal agencies responsible for regulation of the resource or administration of applicable law, and accept public comment before making a determination whether fish and wildlife are being adversely impacted by the operation of the challenged resource.

d. Upon receipt of a determination by the relevant agency, under paragraph b. above, that a resource is not in compliance with applicable licenses or permits or other applicable State or Federal law, and a determination by the Administrator under paragraph c, above, that operation of the resource will adversely impact fish and wildlife resources in the manner described in subsection C.3.c., above, the Administrator will not provide access to the Pacific Intertie for that resource.

e. For a resource that is being operated in compliance with applicable licenses or permits and other applicable State or Federal law, but that the Administrator determines will adversely impact fish and wildlife in the manner described in subsection C.3.c., above, the Administrator will not provide access unless:

- (1) The owner or operator of the resource agrees to modify the operation of the resource in a manner to assure that the operation of the resource will not have the adverse impact determined by BPA; or
- (2) The owner or operator of the resource agrees to make expenditures or take other actions not inconsistent with the program adopted by the Northwest Power Planning Council to protect, mitigate, or enhance fish and wildlife to offset the adverse impact to fish and wildlife described in subsection C.3.c. above.

f. It is the Administrator's intent that the Long Term Intertie Access Policy will not provide access to the Intertie Capacity under that Policy for resources that are not included in the definition of Existing Pacific Northwest Resources under the Near Term Policy, if construction or operation of these resources will adversely impact fish and wildlife resources in the manner described in subsection C.3.c. above.

D. *Assured Delivery and Formula Allocation Methods for Intertie Access*

1. Assured Delivery for Firm Contracts

a. BPA will continue to use Intertie Capacity to perform its obligations under the following BPA contracts:

- (1) Portland General Electric Contract No. 14-03-55063 providing annual Pacific Intertie priority access rights;

- (2) Pacific Power & Light Contract No. 14-03-56379 providing annual Pacific Intertie priority access rights;
- (3) Washington Water Power's transmission Contract No. 14-03-79101;
- (4) Washington Water Power's transmission Contract No. DE-MS79-81BP90185;
- (5) Western Area Power Administration Contract No. DE-MS-79-84B91627 for the purchase of surplus firm power from BPA and transmission of power purchased from the Basin Electric Power Cooperative;
- (6) Pacific Gas & Electric (PG&E) Contract No. 14-03-54132 for the purchase of BPA's seasonal surplus capacity;
- (7) BPA's Capacity/Energy Exchange Agreements, listed below:

Utility	Contract No. (14-03-___)
(a) Burbank	53290
(b) Glendale	53295
(c) Los Angeles	50323
(d) Pasadena	53297
(e) PG&E	54134
(f) SDG&E	58638
(g) SCE	54126

- (8) BPA's sale to PG&E confirmed by letter dated July 31, 1984; and
- (9) New BPA contracts for which BPA claims Assured Delivery. BPA will give notice to Scheduling Utilities of such transactions.

b. For existing or new contracts of a Scheduling Utility other than BPA, Assured Delivery may be provided for a term not to extend beyond July 1986 to the extent that such contract:

- (1) Meets the conditions of section C (conditions for Intertie access) above; and
- (2) Provides for the sale of firm power from specified resources by a Scheduling Utility other than BPA in which the amount of power to be delivered, the price, and terms for delivery are specified in a manner that assures that the contract is not merely an advance arrangement to sell nonfirm power; and

c. BPA will consider the following factors among others, to determine the extent to which a contract of a Scheduling Utility other than BPA can receive assured Delivery:

- (1) The extent to which the selling price is subject to change based on day-to-day fluctuation in market price;
- (2) The extent to which the sale does not increase the costs of the Administrator of Exchange Resources; and
- (3) The extent to which the buyer has the right to displace purchases under the contract with nonfirm energy.

d. Scheduling Utilities other than BPA desiring to arrange for Assured Delivery for a contract must submit such contract to the Administrator. The Administrator shall determine whether the submitted contract meets

the eligibility criteria set forth above, and will provide notification of this determination in writing specifying the amount and term of Assured Delivery to be provided for the contract. BPA will use its best efforts to notify the Scheduling Utility by mail of the determination not later than 20 days from the date BPA receives the contract.

e. In order to receive Assured Delivery under a contract, firm hourly schedules must be established by the Pacific Northwest and Southwest parties, and be made available to BPA prior to allocation of Intertie Capacity. In no case will Assured Delivery be provided for PBA's [sic] or for a Scheduling Utility's total eligible contracts on any hour that exceeds BPA's or the Scheduling Utility's average firm energy surplus as shown in Exhibit B of this Policy, as modified or revised from time to time.

f. A Pacific Northwest utility may increase its average firm energy surplus by purchasing surplus firm power from BPA or any Pacific Northwest utility. BPA will adjust the average firm surplus amounts shown in Exhibit B for the buying and selling utilities accordingly.

g. When BPA firm deliveries and Assured Deliveries of other Scheduling Utilities exceed the available Intertie Capacity as determined by BPA, the Pacific Northwest and Southwest parties will establish schedules for delivery.

2. Formula Allocation Methods

a. BPA will determine the Intertie Capacity available for formula allocations described in subsection b. below, after first taking into account the conditions for Intertie access specified in section C above, the Intertie Capacity necessary to serve contractual obligations as described in subsection D.1.a. (Assured Delivery for Firm Contracts) above, and the Intertie Capacity necessary to provide Assured Delivery for qualifying firm contracts as described in subsection D.1.b. above. Access to the remaining available Intertie Capacity will be allocated according to the formulae described below.

b. One of three formulae will be applied depending on which of the following three conditions exists:

(1) *Condition 1.* When Exportable Energy is being scheduled pursuant to the terms of the Exportable Agreement (BPA Contract No. 14-03-73155), then capacity will be allocated pursuant to the Exportable Agreement. An example of an allocation under Condition 1 is shown in Exhibit A. The allocation procedure of the Exportable Agreement is an existing contractual obligation and has not been changed as a result of the Intertie Access Policy development process.

(2) *Condition 2.* When the Exportable Agreement allocation formula is not in effect, but BPA and other Scheduling Utilities declare amounts of power available for access to the Pacific Intertie that

exceed the available Intertie Capacity determined as described in paragraph a. above, the capacity will be allocated pursuant to the following procedure:

(a) On any day the Scheduling Utilities observe as a normal workday, each Scheduling Utility shall submit to BPA declarations of daily quantities of energy and hourly capacity it has available for sale to the Southwest for the period beginning at midnight of the day of declaration and continuing through midnight of the next normal workday.

(b) Allocations for each hour among Scheduling Utilities will be determined and will approximate the ratio of such Scheduling Utility's declaration to the sum of all declarations for each hour multiplied by the available Intertie Capacity. An example of an allocation under Conditions [sic] 2 is shown in Exhibit A.

(3) *Condition 3.* When the Exportable Agreement is not in effect, but when BPA and other Scheduling Utilities declare power available for access to the Intertie in an amount that does not exceed the available Intertie Capacity, BPA's and each other Scheduling Utility's allocation will be equal to its declaration. An example of an allocation under Condition 3 is shown in Exhibit A.

E. *Extraregional Access*

Extraregional utilities will be allowed access as follows:

1. BPA will not provide Assured Delivery to extraregional utilities.

2. Under Condition 1, the Exportable Agreement precludes a formula allocation of Intertie Capacity to potential users that are not parties to that agreement.

3. BPA may, by contract, provide extraregional utilities limited access to Intertie Capacity under Condition 2. Such access, however, would be conditioned on such utilities' participation in the Pacific Northwest's coordinated planning and operation to a greater extent than in the past or agreement to provide other appropriate consideration of value to the Pacific Northwest.

4. Under Condition 3, extraregional utilities will be able to use Intertie Capacity to the extent that capacity is available in excess to the declaration of Scheduling Utilities.

F. *Remedies*

1. Access to Intertie Capacity is conditioned upon compliance with the terms of this Policy.

2. Upon a determination by BPA that the terms of this Policy are not being met, BPA will so notify the appropriate person(s) setting forth the nature of the noncompliance and the action(s) that may be taken to achieve compliance.

3. BPA will provide a reasonable opportunity to correct such noncompliance before imposing a remedy.

BPA may impose a prospective remedy to account for actions already taken that were not in compliance with this Policy.

4. BPA may fashion and impose an appropriate remedy for noncompliance. Remedies that BPA may impose include, but are not limited to:

- a. denial of access for a resource;
- b. refusal to accept schedules; or
- c. reduction in future allocations.

G. *Exhibits*

1. Exhibits A and Exhibit B are a part of this Policy.

Issued in Portland, Oregon, on October 22, 1984.

Peter T. Johnson,
Administrator.

**Exhibit A — Example of Formula Allocation
Under Condition 1**

Assumptions Used in This Example

1. There is sufficient energy to load the potential Intertie Capacity at 18.5 mills/kWh or less the “applicable rate” under the Exportable Energy Agreement.
2. Declarations of available energy are hourly.
3. Some utilities have firm contracts.
4. Some utilities have intertie priorities.
5. Potential Intertie Capacity equals 5,800 MW.
6. Extraregional utilities are not able to declare or receive an allocation in this condition.

[Exhibit A cont'd]
Example of an Hourly Declaration and Allocation

(1)	Firm (2)	Nonfirm Decla- ration (3)	Nonfirm Alloca- ted (4)	Total Alloca- ted (5)	Re- store (6)	Nonfirm Alloca- ted (7)	Final Alloca- ted (8)
BPA	500	3,000	2,635	3,135	[Blank] 878 <u>1,985</u> x 60	2,635	3,135
IOU ₁	200	1,000	878	1,078	843 <u>1,985</u> x 60	851	1,051
IOU ₂	40	960	843	883		818	858
PGE ₃	[Blank]	500	440	440	+60 88 <u>1,985</u> x 60	500	500
PA ₁	0	100	88	88	176 <u>1,985</u> x 60	85	85
PA ₂	0	200	176	176		171	171
Total	740	5,760	5,060	5,800			5,800

[Exhibit A cont'd]

Description [of Condition 1 example above]:

- Column 1 = Utility that is declaring energy for the allocation procedure.
- Column 2 = The amount of firm energy each utility will deliver, as specified prior to allocation of nonfirm energy.
- Column 3 = Each utility's total hourly nonfirm energy declaration.
- Column 4 = The initial allocation of the potential nonfirm Intertie capacity.
- Column 5 = The initial allocation of Intertie Capacity (5,800 MW).
- Column 6 = The reallocation that is required because of Portland General Electric's priority to the Intertie. NOTE: BPA does not share in these pro rata reductions necessitated by enactment of priority rights.
- Column 7 = The final nonfirm allocation of the potential nonfirm Intertie capacity.
- Column 8 = The final total allocation of the potential Intertie Capacity (5,800 MW).

After the final allocation for each hour of the preschedule day or days is determined, Pacific Northwest utilities would be informed of their allocation and would either negotiate sales at other than the 18.5 mills/kWh price or be combined with BPA's allocation at 18.5 mills/kWh and receive a pro rata share of BPA sales.

[Exhibit A cont'd]

Example of Formula Allocation Under Condition 2

Assumptions Used in This Example

1. Hourly energy available at 18.5 mills/kWh or less within the region is not sufficient to cover the potential SW market.
2. The hourly energy available at any price is more than sufficient to cover the potential SW market.
3. Utah has other transmission paths and, therefore, will not participate.
4. Some utilities have firm contracts.
5. Potential Intertie Capacity equals 5,800 MW.
6. No utility has a priority.

Example of the Hourly Declaration and Allocation

(1)	Firm (2)	NF decl. (3)	NF alloc. (4)	Total alloc. (5)
BPA	500	2,000	1,350	1,851
IOU ₁	200	1,300	877	1,077
IOU ₂	40	1,960	1,323	1,363
PGE	700	0	0	700
PA ₁	0	100	67	67
PA ₂	0	200	135	135
IOU ₃	0	900	607	607
Total	1,440	6,460	4,360	5,800

[Exhibit A cont'd]

Description [of Condition 2 example above]

Column 1 = Utility which is declaring energy for the allocation procedure.

Column 2 = The amount of firm energy each utility will deliver, as specified prior to allocation of nonfirm energy.

Column 3 = Each utility's nonfirm energy declaration.

Column 4 = The initial allocation of the potential nonfirm market.

Column 5 = Total allocation (nonfirm + firm) of the 5,800 MW Intertie Capacity.

[Exhibit A cont'd]

Example of Formula Allocation Under Condition 3

Assumptions Used in This Example

1. Energy available at any price is not sufficient to cover the potential market (exclude BCH and WK).
2. The potential Market equals 5,800 MW.
3. Some utilities have firm contracts.
4. No intertie priorities remain.

Example of the Hourly Declaration and Allocation

	Firm	NF decla- ration	NF alloca- tion	Total alloca- tion
(1)	(2)	(3)	(4)	(5)
BPA	500	0	0	500
IOU ₁	200	800	800	1,000
IOU ₂	40	1,460	1,460	1,500
IOU ₃	700	0	0	700
PA ₁	0	100	100	100
PA ₂	0	200	200	200
IOU ₄	0	500	500	500
Subtotal	1,440	3,060	3,060	4,500
BCH	0	2,400	1,200	1,200
WK	0	200	100	100
Total	1,440	5,660	4,360	5,800

Description:

The logic followed in columns 1-5, above, are the same as used in Condition 2, except that BCH and WK have been added. Their allocations are based upon the

prorata [sic] distribution of the capacity remaining after first reducing the Intertie Capacity by sum of the firm and NF Declarations for BPA and other scheduling utilities. It is understood that the net interchange between BCH and BPA is limited to 2,000 MW.

Exhibit B

Utility	Average Firm Surplus ¹	Average Firm Surplus ¹ August through December ²
Bonneville Power Administration	1,473	2,651
Seattle City Light	0	0
Tacoma City Light	4	7
Grant County PUD	40	72
Douglas County PUD	0	0
Chelan County PUD	23	41
Pend Oreille PUD	0	0
Eugene Water and Electric Board	28	50
Cowlitz County PUD	3	5
Snohomish County PUD	0	0
Montana Power Company	3	5
Idaho Power Company	0	0
Pacific Power & Light Company	361	650
Portland General Electric Company	135	243
Puget Sound Power & Light	0	0

[Exhibit B cont'd]

Utility	Average Firm Surplus ¹	Average Firm Surplus ¹ August through December ²
Utah Power & Light Company	0	0
Washington Water Power Company	53	95

¹ Except that in no operating year may a scheduling utility have Assured Delivery for more energy than the amount of Average Firm surplus shown in Column 1 times the number of hours in the operating year, and except that in the remainder of the 1984-85 operating year no scheduling utility may have Assured Delivery for more than the amount of Average Firm Surplus shown in Column 1 times 6936 hours.

² Except that in the months of November and December when the Exportable Agreement is in effect, the Average Firm Surplus shall be the amount shown in Column 1.



APPENDIX E



APPENDIX E

NEAR TERM INTERTIE ACCESS POLICY

ADMINISTRATOR'S RECORD OF DECISION

SEPTEMBER 1984

I. Introduction

The Bonneville Power Administration (BPA) adopted the Near Term Intertie Access Policy to be in effect for 6 months, in order to enhance BPA's Power Marketing Program and to provide certainty with respect to firm and nonfirm transactions that may occur on the Federally-owned portions of the Pacific Intertie. Specifically, BPA Policy accomplishes several important purposes. First, BPA's Policy assures that BPA has use of its portion of the Pacific Intertie as necessary for BPA's Power Marketing Program. Second, BPA must consider the financial impacts of Pacific Intertie usage of BPA's ability to recover adequate revenues. In this regard, BPA's Policy enhances BPA's ability to recover revenue that otherwise would be lost if BPA failed to manage prudently its portion of the Pacific Intertie. Third, BPA's Policy responds to the recent influx of requests for more space on the Pacific Intertie than there is available capacity. BPA's Policy fosters increased certainty in power sales between BPA, Pacific Northwest utilities, and Southwest utilities.

BPA has actively sought public comments on its efforts to develop an Intertie Access Policy since July 22, 1983. The record developed on this issue

consists of comments on Bonneville Power Administration (BPA's) Notice of Intent to Develop Intertie Policy published on July 22, 1983 (48 FR 33515); comments on a Discussion Paper of policy issues published on February 16, 1984 (49 FR 5990); the transcripts of three public comment forums held on July 24 and 25, and August 3, 1984, on a proposed Near Term Intertie Access Policy; written notes of BPA personnel of a July 24, 1984, meeting with technical operators of the Intertie; written comments received by the close of the comment period on this proposal, August 13, 1984, and a reasonable time thereafter; and additional correspondence on the topic of extraregional access. The public comment forums were attended by 124 persons, representing BPA customers, interest groups and other government agencies. BPA also received 55 written comments totaling 398 pages from the above interests as well as comments from individuals on the proposed Near Term Intertie Access Policy. (See Appendix A for abbreviations used in this document and Appendix B for a listing of those persons attending the public comment forums and those making written comments.)

This document presents the Bonneville Power Administration (BPA) evaluation of the record of the proposed Near Term Intertie Access Policy and the Administrator's decisions on the issues identified within the record. The record on which this Record of Decision is based consists of the comments received on BPA's proposed policy issued on July 13, 1984, and published in the FEDERAL REGISTER on July 30, 1984 (49 FR 30098); the comments made at the public comment forums; any previous comments specifically incorporated by reference by the commenters; and related documents. The Record of Decision is divided

into four major sections: (1) Introduction, addressing the purpose of the Policy, the process used to develop the Policy, and BPA's legal authorities to implement the Policy; (2) Preliminary Issues, describing the context of the Policy within BPA's other actions and responsibilities and the pervasive concepts embodied within the Policy; (3) Conditions for Access, describing the overall standards the Policy applies to determine whether access to the Intertie will be provided for a particular resource or arrangement; and (4) Firm Contracts and Formula Allocation Methods, discussing the specific operative elements of the policy that are necessary to allocate access to the Intertie. Within each section, the appropriate comments are grouped by topic into issues. The issues are divided into three sections: (1) a summary of comments that describes BPA's initial proposal on the issue and briefly summarizes the comments on the issue; (2) an evaluation of the comments that discusses the various arguments on the issue and BPA's evaluation of those arguments; and (3) the decision that explains the Administrator's decision on the issue as reflected in the Policy as adopted.

A. Process

The development of BPA's Intertie Access Policy has been an extensive process. It commenced on July 22, 1983, with publication in the FEDERAL REGISTER of a Notice of Intent to Develop Intertie Policy (48 FR 33515). This notice was provided consistent with BPA's "Major Power Marketing Policy Procedures." (46 FR 26368) In response to that Notice, BPA met with numerous organizations and interest groups to identify, discuss, and seek advice on the

issues that must be resolved by an access policy. BPA received 55 comments in response to the July 22 Notice. These comments and advice generated a Discussion Paper that was published in the FEDERAL REGISTER on February 16, 1984, with a request for comments from the public (49 FR 5990). This Discussion Paper described possible BPA policies for use of the Intertie by BPA and others within existing contractual obligations. BPA received 76 written comments in response to the Discussion Paper and held informal meetings with customer and public interest groups.

The Administrator considered the comments on the Discussion Paper in the context of BPA's own efforts to resolve basic access priority issues given the current Pacific Northwest power surplus of firm and nonfirm power. The Administrator concluded that a multi-staged policy development was appropriate. This Near Term Intertie Access Policy is the first stage of that policy development.

The Administrator's decision was based on his recognition that there are both long term and short term Intertie access issues. This Near Term Intertie Access Policy is adopted for 6 months and is intended to focus attention on the allocation of scarce Intertie space among competing users of the Intertie. The current power glut in the Pacific Northwest has caused Intertie access conflicts regarding the amount and quality of Intertie service. These conflicts, and practices by Intertie owners in the Southwest, have depressed prices in the Pacific Northwest for the power utilizing the Intertie. These depressed prices have resulted in BPA revenue shortfalls which have handicapped BPA's ability to recover the costs

associated with Federal investment in the Federal Columbia River Power System (FCRPS). BPA and others believe that these problems require immediate solution.

The initial Near Term Intertie Access Policy is in effect for approximately 6 months. During this 6-month period environmental analyses of the Policy will be conducted and operational experience with the Policy will be gained. Further opportunities for public comment on proposed revisions to the initial Policy also will be provided. Based on these comments, the results of the environmental analyses and the operating experience, the Near Term Policy may be revised at the end of the 6-month period. The revised Policy then will be adopted for the remaining approximately 18 months. The Near Term Policy will be followed by a Long Term Intertie Access Policy.

The Long Term Intertie Access Policy is necessary because separate questions are raised regarding the interrelationship of Intertie access priorities to long term firm power transactions, to new Intertie facilities development, and to new resource development. These longer term questions require consideration of different issues and involve different potential impacts. These issues militate for additional features of an access policy and require additional policy development. The Near Term Intertie Access Policy by comparison, will resolve immediate, more discrete access issues that result from the present power surplus.

BPA expects to publish an initial draft of the Long Term Intertie Access Policy during the Fall of 1984. Concurrent with that publication, BPA will commence scoping an environmental analysis of the Long Term

Policy. BPA anticipates that, because of possible implications for future resource development, the Long Term Intertie Access Policy may require an environmental impact statement. The environmental statement could take as long as 2 years to complete.

Issue #1: Summary of Comments

Los Angeles Department of Water and Power (LADWP) alleged that BPA had failed to comply with the Administrative Procedures Act. (Cotton, LADWP, comments dated 8/13/84, pp. 1-2.) Both Southern California Edison (SCE) and the Western Area Power Administration (Western or WAPA) felt BPA was acting hastily to adopt the Near Term Intertie Access Policy for the initial 6 months, and requested further opportunity to comment. (Myers, SCE, letter dated 8/14/84, p. 1; Coleman, WAPA, letter dated 8/13/84 p. 5.) Pacific Gas and Electric Company (PG&E) inquired as to the evaluation BPA would make of the comments made on the Policy. (Fiske, PG&E, TR 383.)

Evaluation of Comments

LADWP maintains that the procedure utilized to formulate this Policy does not comply with the Administrative Procedures Act, particularly section 556. BPA notes that section 9(e)(2) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) specifically provides that in reviewing final actions of the Administrator "... Nothing ... shall be construed to require a hearing pursuant to section 554, 556, or 557 of title 5 of the United States Code." (16 U.S.C. §839f(e)(2).)

SCE objects to the adoption of the Policy after a 30-day comment period, three public comment forums, and an informal meeting with the Intertie operators, charging that BPA is acting in haste. (Myers, SCE, letter dated 8/13/84, pp. 1-2.) Western asserts that because of the importance of the Policy and the likelihood that substantial changes will occur from the draft to the Policy as adopted, BPA should provide an additional 30-day comment period. (Coleman, WAPA, letter, dated 8/13/84, p. 5.) BPA believes that it has provided more than adequate due process in the formulation of its Policy.

The Policy is an action subject to BPA "Procedures For Public Participation In Major Regional Power Marketing Policy Formulation." (46 FR 26368.) These procedures, as adopted on May 12, 1981, require BPA, when promulgating a major power marketing policy, to provide notice and comment opportunities before adoption of a policy. In keeping with these procedures BPA has conducted over a year long public involvement process to allow interested persons to comment first on the concept of an Intertie Policy, next on specific issues, and now on a draft Policy.

In formulating the policy itself, BPA provided a full 1-month comment period. Comments from interested persons received after the final date identified for receipt of comments also were considered. In the 1-month comment period, BPA held three public comment forums. The recorded meetings generated 327 pages of transcribed comments. The transcripts reflect that the Policy was dealt with on a line-by-line, issue-by-issue basis. BPA offered at the outset to hold additional meetings within the comment period "... if specific issues and problems ..." were identified.

(Jones, BPA, TR 6-7.) One of the three meetings was held for just such a purpose. (Jones, BPA, TR 212.) Throughout this process SCE, Western, LADWP, and PG&E, as well as 120 other interested utilities and public interest groups, have participated and made comments.

BPA has carefully considered and evaluated the comments received, and written a Record of Decision based on transcripts of the three public comment forums and the comments received in response to the July 13, 1984, draft Policy. Significant Policy revisions have been made based on these comments. BPA has stated that additional opportunities for public comment will be afforded and that the Policy will not be amended without adequate procedures. (Jones, BPA, TR 305; Michie, BPA, TR 44-45; McLennan, BPA, TR 47.)

Decision

BPA adopts this Near Term Intertie Access Policy for an initial period of 6 months. BPA believes that it has provided more than sufficient opportunity for public comment on this policy.

Issue #2: Summary of Comments

Washington Water Power (WWP) commented that 6 months is not an adequate period in which to gain operating experience under the Near Term Intertie Access Policy. WWP asks for an initial adoption period of 1 year. (Bryan, WWP, letter dated 8/9/84, p. 2.)

Evaluation of Comments

WWP recommends a 1-year initial adoption period in order to gain operational experience under the Policy during the range of operating conditions experienced over an entire year. This recommendation has merit from an operational perspective. However, as stated in the general discussion above, BPA has chosen a 6-month initial adoption period for two reasons. The first reason is that 6 months is the period required to conduct the necessary environmental analyses on a proposed Near Term Policy to be in effect for approximately 18 months. The second reason is to gain operating experience. If the environmental analysis finds that the Policy should be altered after the 6 months to avoid environmental effects, revisions in the Policy could occur at that time.

Decision

BPA is implementing the Near Term Intertie Access Policy for 6 months. After conducting necessary environmental analyses, gaining operational experience and inviting additional public comment, the Policy may be revised to reflect any of these concerns. BPA expects to adopt the revised Policy for approximately 18 months.

Issue #3: Summary of Comments

The Public Generating Pool (PGP) urged that any revisions to the Policy during the effective period of the Policy be made only after adequate opportunity has been given for public comment. The PGP also urged that the Near Term Intertie Access Policy remain in

effect until the Long Term Policy is adopted. (Garman, PGP, letter dated 8/9/84, p. 2.)

Evaluation of Comments

The PGP's first comment reflects an apparent concern that policy revisions might be made subject to public notice only, without providing opportunity for public comment. As stated above, during the initial 6-month period, BPA will provide additional opportunity for public comment on proposed Policy revisions. These comments will be considered before a revised Policy is adopted for the remaining 18 months. In addition, should BPA determine during the remaining 18 months that the Policy requires a substantial revision, BPA will provide opportunity for public comment on the proposed revision.

The PGP's second suggestion is that the Near Term Policy remain in effect until the Long Term Policy is adopted. BPA has considered this approach, but has determined to reexamine the Near Term Policy in 6 months. BPA will adopt a final Near Term Policy for about 18 months. As stated, BPA believes the development of the Long Term Intertie Access Policy and the necessary environmental analyses and documentation may require approximately 2 years. BPA does not believe that development of the Long Term Policy will take longer than 2 years; but, should that occur, BPA would consider extending the effective term of the Near Term Intertie Access Policy.

Decision

Consistent with its "Procedures for Public Participation in Major Regional Power Policy Formulation" and

other applicable law, BPA will provide opportunity for public review and comment on any substantial revisions to the Near Term Intertie Access Policy.

B. Authority

1. Introduction

Several commenters suggested that Congress mandated open access to the Intertie, and precluded an allocation mechanism. (Myers, SCE, letter dated 8/13/84, p. 9; Niggli, SDG&E, letter dated 8/13/84, p. 2; Gardiner, PG&E, letter dated 8/10/84, p. 3; Cotton, LADWP, letter dated 8/13/84, p. 3.) SCE and PG&E assert that BPA does not have the legal authority to restrict Canadian energy from Intertie access. (Myers, SCE, letter dated 8/13/84, p. 9; Gardiner, PG&E, letter dated 8/10/84, p. 10.) The Direct Service Industries (DSI) assert, to the contrary, that the Administrator has no authority to allow access to the Federal Intertie until BPA's surplus is sold. (Wilcox, DSI, letter dated 8/13/84.)

2. The Administrator's Power Marketing Program

Issue #1: Evaluation of Comments

Many commenters questioned BPA's conditioning of Intertie access on compliance with its own Power Marketing Program. Some of these comments concern BPA authority. These and other Power Marketing Program issues are discussed in the section of the Record of Decision discussing Conditions for Access.

3. Allocation of Intertie Capacity

Issue #2: Evaluation of Comments

During Condition 2, BPA proposed to allocate available Intertie capacity for surplus power transactions on the basis of each seller's pro rata share of the total available supply. SCE argued, without statutory citation, that Congress mandated that competitive market forces create Intertie allocation for Pacific Northwest sellers. (Myers, SCE, letter dated 8/13/84, pp. 9-10.) Similar assertions were made by San Diego Gas and Electric (SDG&E) and PG&E. (Niggli, SDG&E, letter dated 8/13/84, p. 2; Gardiner, PG&E, letter dated 8/10/84, p. 3.)

References in the legislative history of the Regional Preference Act to the benefits accruing to Pacific Northwest utilities from the construction of the Intertie primarily involved the benefits accruing through lower BPA power sales rates as a result of the increased revenues generated from sales of *BPA surplus* in the Southwest market. (Hearings on H.R. 11201 Before the House and Senate Appropriation Committees, 88th Cong., 2d Sess. 9 (1964) (Dept. of Interior Rep., at p. 34) (hereinafter Dept. of Interior Rept.). The Department of Interior Report, however, also recognized BPA's intention to allocate some Intertie capacity to Northwest generating utilities on the basis of their respective shares of the regional nonfirm surplus. (*Id.* at 27.) Also, in its bid to construct a portion of the southern portion of the Intertie, the California Power Pool stated that it would purchase Pacific Northwest surplus energy not on a competitive basis, but rather on an equitable pro rata basis from participating Pacific Northwest sellers. (Supplement to

Pacific Northwest Intertie Proposal of California Utility Companies, May 9, 1964.) In contrast to the above understandings, Congress showed relatively little concern about competition issues and was satisfied that diverse ownership of the Intertie, and the requirement that owners make available to others any capacity they did not need, would provide equitable access to all generators and avoid any monopolization of the lines. (Dept. of Interior Rep. at p. 20.)

The legislative history description of BPA's pro rata allocation plan was not incorporated into the words of the statute. Rather, with respect to sales of Pacific Northwest surplus power, Congress enacted section 6 of the Regional Preference Act to provide BPA the authority to operate Federal Intertie capacity as a vehicle for sale of BPA surplus power to the Southwest. It left to BPA the decisions on how to manage the remaining Intertie capacity. On the basis of the expectations set out in the legislative history, BPA implemented a pro rata sharing approach to Intertie capacity in 1969 when it offered and executed the Exportable Agreement (BPA Contract No. 14-03-73155). The contract is a long-standing interpretation of BPA's statutory authority to allocate Intertie capacity on a pro rata basis.

PG&E's references to statements in the legislative history of the Northwest Power Act concerning the continuing freedom of Pacific Northwest utilities to develop their own resources and to dispose of their own power are not relevant to the issue at hand. (Gardiner, PG&E, letter dated 3/16/84, pp. 3-4.) Those statements relate to the interrelationship of the Northwest Conservation and Electric Power Plan to independent utility resource development, to the ability of non-

Federal entities to sell their resources outside the Pacific Northwest in a manner less restricted by regional preference principles than those that apply to BPA, and to the utilities' continuing discretion to choose the manner in which they intend to meet their load obligations, that is, with or without BPA power or its resource acquisition programs. These statements do not affect in any way BPA's authority with respect to the management of the Federal Intertie.

SCE argues that section 6 of the Regional Preference Act "compels the Federal government to make excess Federal transmission capacity available as a common carrier to transmit federal power for others." (Myers, SCE, letter dated 8/13/84, p. 12.) To the contrary, that section does not use the term "common carrier", which is a term of art in the field of utility regulation. It uses the term "carrier." (16 U.S.C. §837e.) There is nothing in the legislative history to suggest that Congress, by use of that term, intended anything other than that excess capacity be made available to "carry" non-Federal energy. The Regional Preference Act does not prohibit BPA from equitably allocating Intertie capacity among users. BPA has implemented an allocation mechanism for Intertie access for 15 years under the Exportable Agreement. As stated above, the Interior Department reported to Congress BPA's intention to institute a pro rata allocation mechanism. Congress did not reject this approach. In the absence of any mandated method of providing Intertie access, Congress must be found to have granted the Administrator the discretion normally granted to Federal agencies in the management and disposal of Federal property. (See discussion, *infra*, Power Marketing Program.)

4. Access to the Intertie for Canadian Power

Issue #3: Evaluation of Comments

BPA proposed to exclude transmission of power between Canadian utilities and Southwest entities when there were more requests from Pacific Northwest sellers than available Intertie capacity. BPA also sought comment on providing access for such transactions if Canadian utilities agreed to participate more fully in coordinated river operations. SCE and PG&E argue that BPA has no authority to preclude Canadian power from Intertie transmission during times when there is more Pacific Northwest demand for Intertie capacity than available capacity. (Myers, SCE, letter dated 8/13/84, pp. 11-12; Gardiner, PG&E, letter dated 8/10/84, p. 10.) Other commenters supported the concept of a regional priority to available Intertie capacity. (O'Banion, SMUD, letter dated 8/10/84, p. 3; Bredemeier, PGE, letter dated 8/13/84, p. 2; Boucher, PP&L, letter dated 8/13/84, p. 3; Pugh, NCPPA, letter dated 8/13/84, p. 2; Schultz, ICP, letter dated 8/10/84, p. 2; Jacquot, WPSC, letter dated 8/8/84, p. 2.)

BPA interprets its statutory authorities to allow it to refuse Intertie access to Canadian entities when the requests by Pacific Northwest utilities for use of the Intertie are greater in amount than the available Intertie capacity. Section 6 of the Regional Preference Act assures access only to Canadian Treaty power, that is, the power generated in the United States to which Canada became entitled as a result of the U.S. - Canadian Treaty and its cooperative planning and operation of the Columbia River system. (Treaty between Canada and the United States of America

Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638.) (See, Dept. of Interior Rept. at p. 40.) Transmission of Canadian Treaty power to California was a critical element in obtaining Congressional approval of the Intertie, as PG&E correctly points out. (Gardiner, PG&E, letter dated 8/10/84, p. 10.) However, Canadian Treaty power *excludes* power not governed by the sales contracts between the Columbia Storage Power Exchange (CSPE), the nonprofit Pacific Northwest corporation established to sell the Canadian entitlement power during the period when Canada did not need the power, and California utilities. Those contracts have since terminated. No Canadian Treaty power currently flows over the Intertie to California entities. This statutory priority does not extend to non-Treaty power.

The legislative history listing of benefits arising out of construction of the Intertie included only benefits to the Pacific Northwest and Pacific Southwest. (Dept. of Interior Rept. at p. 32.) Energy transactions listed as being the purpose of the Intertie were always described as being between the two Pacific regions of the United States. Even the sale of Canadian Treaty power took the form of sales between the Pacific Northwest and the Pacific Southwest. (Dept. of Interior Rept. at p. 33.) The legislative history specifically states that the Administrator "may" provide transmission for non-Treaty Canadian power. (H.R. Rep. No. 590, 88th Cong., 2d Sess. 9 (1964).) The subsequent statement that non-Treaty power should be treated equally with Pacific Northwest power, if it is provided Intertie access, is a mere reassertion that non-Treaty power, as other non-Federal power, does not have the priority

given to Federal or Canadian Treaty power. The legislative history of section 6 of the subsequently enacted Federal Columbia River Transmission System Act refers only to use of BPA's transmission facilities for the distribution of electric power "in and from the Pacific Northwest." (H.R. Rep. No. 1030, 93rd Cong., 2d Sess. 9 (1974).)

5. BPA's Obligation to Reserve Sufficient Intertie Capacity to Sell All of Its Available Surplus Prior to Providing Capacity to Non-Federal Entities

Issue #4: Summary of Comments

The DSIs argue that BPA must reserve sufficient Intertie capacity to market its available surplus before providing access to non-Federal entities. (Wilcox, DSI, letter dated 8/13/84.)

Evaluation of Comments

The DSIs legal conclusion that BPA is obligated to utilize its Intertie facilities to force sales of its own surplus goes too far. While BPA believes that it has the discretion to act in this manner, such a policy would not at this time best serve the Federal stewardship role BPA presently sees for itself with respect to the Intertie. BPA acts as Federal steward with ownership or contract rights to most of the high voltage transmission needed to sell power outside the Region. As a steward, BPA believes the best policy at this time is to offer to share this transmission capacity with other Pacific Northwest scheduling utilities and entities. This sharing concept can facilitate longer term

sales of firm power to California than would otherwise be possible. BPA is unable to make such sales directly because of the restrictions of the Northwest Preference Act. However, BPA believes that non-Federal long term sales can offer the opportunity to reduce the regional surplus of power and, over time, can cause those utilities which are BPA customers to purchase additional power from BPA. In this manner BPA believes that its Policy will benefit both the Pacific Northwest and the Southwest and help assure the widespread use of power to consumers at the lowest possible rates consistent with sound business principles.

The objections raised against this policy are that BPA will not maximize its own revenues and therefore will be unable to keep rates as low as would otherwise be possible. (Wilcox, DSI, letter dated 8/13/84 and attachments.) BPA recognizes that its Policy will need to be carefully balanced against BPA's revenue requirements. BPA believes that the revenue requirements provisions of the statutes which govern its operations are incorporated into the Power Marketing Program definition. BPA will weigh the effectiveness of the Policy against these revenue requirements and will review requests for access accordingly. BPA will consider revising the Policy if among other reasons its concept of shared access unreasonably impedes its ability to meet its reasonable revenue needs. BPA believes that this is consistent with the comments of those who recognized that one of BPA's obligations is to generate revenues which will permit BPA to maintain BPA rates at the lowest possible level consistent with sound business principles while repaying the Federal investment in the BPA system. (Foleen, letter dated 8/10/84 at p. 1; Wilcox, DSI, letter and attachments dated 8/13/84, p. 2.)

BPA has the authority to utilize Intertie capacity on a priority basis to effectuate BPA's own sales. However, the statutes only provide the authority to do so, not the obligation to apply it to the fullest extent possible. As stated above, the Interior Department reported to Congress in 1964 that BPA intended to allocate transmission capacity to Pacific Northwest utilities on the basis of their pro rata shares of the Region's surplus, a concept contradictory to the present assertion of the DSI's. Obviously, BPA's contemporaneous understanding of the Regional Preference Act was that it had been granted that authority because it quickly offered and executed the Exportable Agreement after the completion of Intertie construction. That agreement is now in its 15th year of operation.

In contrast to statutory obligations based on social policy, such as the mandate to provide preference and priority to public bodies and cooperatives in the sale of BPA power, the statutes provide substantial discretion to the Administrator in exercising business judgment in the use and management of Federal property, including whether to sell surplus energy, how much, and under what terms. This discretion also applies to determine how much of the Intertie is appropriate or necessary to carry out BPA's Power Marketing Program. Section 6 of the Federal Columbia River Transmission System Act, cited by the DSI's to support their assertion that Congress mandated use of sufficient Intertie capacity to sell all of the available Federal surplus, states that the *Administrator* (not Congress) is to determine how much transmission capacity is needed by BPA. Section 9(i)(3) of the Northwest Power Act, also cited by the DSI's, similarly defers to the Administrator's judgment with the words

“unless he determines such services cannot be furnished without substantial interference.” Even section 2(b) of the Bonneville Project Act, which the DSIs cite as the source of BPA’s power marketing obligations, strongly defers to the Administrator’s judgment with the words *“as he finds* necessary, desirable or appropriate”. The statutory provisions referenced by the DSIs do not contain the mandate which they assert has been imposed on the Administrator. There is no such mandate. Congress provided an authorization to make first use of the transmission facilities, not a mandate.

Section 5(b) of the Bonneville Project Act was the first statutory provision dealing with BPA’s system surplus. It merely authorizes the Administrator to enter into contracts for its sale or exchange. Similarly, the provisions in the Regional Preference Act and the Northwest Power Act relating to sales of Federal surplus energy outside the region do not require the Administrator to effectuate such sales; they merely place restrictions on such sales if they are made. Indeed, section 5(f) of the Northwest Power Act states that “the Administrator is authorized to sell, or otherwise dispose of, electric power . . . that is surplus to his obligations” All of these sections are consistent with Congress’ grant of broad discretionary authority to the Administrator in section 2(f) of the Bonneville Project Act to operate BPA’s system and facilities essentially as a utility business, with the same flexibility and decisionmaking freedom that characterizes a business. To argue that Congress mandated the Administrator to use all available Intertie capacity to sell all of BPA’s existing surplus is contrary to the express wording of the statutes that the Administrator has the discretion to enter into such sales. Such a construction would result in a negation of that

discretion and therefore is to be avoided. (C. Sands, *Sutherland Statutory Construction*, §46.06 (4th ed. 1973).)

The DSIs argue that the Administrator has the obligation to operate Federal Intertie ownership consistent with sound business principles and that such principles require the reservation of sufficient Intertie capacity to transmit all of the available Federal surplus. Though BPA respects others' views of what constitutes sound business principles, this decision ultimately is lodged with the Administrator. Congress' reference to "sound business principles" in section 5 of the Flood Control Act of 1944 and in section 9 of the Federal Columbia River Transmission System Act was not an objective mandate, but rather a limitation on the obligation to provide the "lowest possible rates." Congress' use of the term in section 7(a)(1) of the Northwest Power Act is in reference to establishing rates to recover BPA's costs. It is not a mandate to take any particular power marketing action with respect to sales of Federal surplus.

6. Relationship to 7(i) and 7(k)

Issue #1: Summary of Comments

SCE suggests that the Intertie Access Policy represents a change in the availability and implementation of BPA's transmission and wholesale power rates. (Myers, SCE, letter dated 8/13/84, p. 6.) LADWP suggests that the Intertie Access Policy constitutes a change in rates. (Cotton, LADWP, comment dated 8/13/84, p. 2.) PG&E suggests that the Intertie Access Policy is a rate adjustment. (Gardiner, PG&E, letter dated 8/10/84, p. 4.)

Evaluation of Comments

SCE suggests that the Intertie Access Policy is an integral part of the implementation of BPA's rates which should be subject to the procedural requirements of section 7(i) of the Northwest Power Act. SCE does not suggest that the Intertie Access Policy constitutes ratemaking, rather that the Intertie Access Policy constitutes an attempt to limit competition with BPA sales of surplus firm power and nonfirm energy. (Myers, SCE, letter dated 8/13/84, p. 7.) This alleged attempt to limit competition is suggested by SCE to effectively modify rates. (*Id.* at 7.) SCE relies on sections D.2.d. and E. of the draft Policy as "demonstrating an intent to modify rates."

Section D.2.d. provided:

d. In either Condition 2 or 3, if a Southwest purchaser cannot purchase power because the Pacific Northwest power available to it is priced at a level that would not allow the purchaser to displace the highest cost thermal resources it would otherwise operate, and there are no other Southwest utilities that are able to accept the offer, then if the Pacific Northwest utility is unwilling to lower the price to an economic level, the Pacific Northwest utility would lose the allocated share of the Interties to other Pacific Northwest suppliers.

Section D.2.d. required that a Pacific Northwest utility which does not reduce its selling price to an economic level would lose its allocated share of the Intertie. Section D.2.d. generally was opposed by Pacific Northwest and Southwest utilities for a variety

of reasons and has been removed from the proposed Intertie Access Policy. SCE's argument based on section D.2.d. is therefore moot.

SCE also suggests that section E of the Policy "demonstrate[s] an intent to modify rates" (Myers, SCE, letter dated 8/13/84, p. 7.) Section E, however, provides conditions when extraregional utilities may gain access to Intertie capacity. Again, SCE has provided no explanation of how extraregional access to the Intertie would affect BPA's established rates. There is no support for the suggestion that the Policy constitutes ratemaking.

SCE apparently argues that the Intertie Access Policy limits competition with BPA sales, thus allowing BPA to maximize its revenues from nonregional customers. As noted above, however, BPA can only charge established rates for power. Nothing in the Policy changes this fact. If BPA were to change its rates, such changes would be subject to section 7(i) proceedings. The Policy, however, does not modify BPA's rates.

LADWP cites section 7(a) of the Northwest Power Act as supporting the proposition that the Intertie Access Policy constitutes a change in rates. (Cotton, LADWP, comments dated 8/13/84, p. 2.) Section 7(a)(1), (16 U.S.C. §839e(a)(1)), provides in part:

"The Administrator shall establish and periodically revise rates for the sale and disposition of electric energy and capacity *and for transmission of nonfederal power.*" (emphasis added).

This provision requires the Administrator to establish rates for transmission services. The fact that the Administrator establishes transmission rates is

completely separate from development of the Policy. Rates establish the price at which customers purchase transmission from BPA. BPA's Procedures Governing Bonneville Power Administration Rate Adjustments, (47 Fed. Reg. 6240 (1982)), define the term "rate":

(g) *Rate*. The monetary charge or the formula for computing such a charge for any electric service provided by BPA, including charges for capacity (or demand), energy, or transmission service, and discounts or surcharges; however, it does not include transmission line losses, leasing fees, or other types of facility use charges for other than transmission of non-Federal power, or charges for operation and maintenance of customer-owned facilities. A rate may be set forth in a rate schedule or in a contract.

BPA establishes rates in accord with the procedures established in section 7(i) of the Northwest Power Act. (16 U.S.C. §839e(i).) The Intertie Access Policy, however, clearly is not a rate. The Policy does not establish charges for transmission services. The Policy simply allocates limited access to the Federal portion of the Intertie. The Policy therefore does not establish new transmission rates. LADWP has given no explanation of how the Policy constitutes any change in BPA's rates.

PG&E alleges the Intertie Access Policy effectively adjusts BPA's rates for three reasons. First, PG&E alleges that BPA stated the Policy would be changed if BPA were experiencing a revenue shortfall, quoting a statement by Jim Jones of BPA. Second, PG&E quotes a statement from BPA's Issue Alert that describes the NF-83 Nonfirm Energy rate. Finally, PG&E alleges

that the Intertie Access Policy will affect the amount of energy BPA can offer on a guaranteed basis under the NF-83 rate schedule.

PG&E's first argument alleges that a BPA representative stated the Policy would change if BPA were experiencing a revenue shortfall. The quotation of the BPA representative, however, belies PG&E's allegation. PG&E states:

"At the July 24, 1984, hearing, Jim Jones of BPA was asked:

[L]et's say Bonneville was not collecting the revenues they thought it would — would Bonneville then go through a due process in order to change the policy — in order to allow you to meet your revenue requirements?

Mr. Jones replied:

I think what I am trying to say is that Bonneville will not change the policy without going through due process. The decision on whether we have to change the policy will be made by the Administrator, looking at the facts that exist at the time.

(July 24, 1984, Hearing Transcript, at 40.)"
(Gardiner, PG&E, letter dated 8/10/84, p. 1.)

Mr. Jones clearly did not state that BPA would change the Policy if BPA were experiencing a revenue shortfall. Mr. Jones simply stated that if BPA were to change the Policy, BPA would comply with appropriate procedures in doing so. Any decision to change the Intertie Access Policy would have to be made by the Administrator after consideration of all facts existing at that time. PG&E has provided no support for its allegation. Even if one were to assume, *arguendo*, that

the Policy might have some indirect effect on BPA's revenue requirement, this does not constitute ratemaking. Every BPA program affects BPA's revenue requirement. This does not mean every BPA program constitutes ratemaking.

PG&E's second argument consists solely of a quote from BPA's Issue Alert:

"BPA's standard nonfirm rate now is 18.5 mills. But the spill rate of 11 mills served to undercut that rate. Allocation of access to the Intertie among BPA and all Northwest generating utilities with surpluses to market should enable them to increase their revenue from California sales. BPA has gained necessary approvals to charge the standard nonfirm rate of 18.5 mills for transactions on the Intertie and intends to do so."

(BPA Issue Alert, Update: BPA's New Intertie Access Policy, 7/84, p. 6.)

This statement simply describes the existing NF-83 Nonfirm Energy rate. The NF-83 rate contains both a Standard rate and a Spill rate. The Intertie Access Policy does not amend or modify the multicomponent NF-83 rate in any way. All components of the NF-83 rate were approved on an interim basis by the October 26, 1983, order of the Federal Energy Regulatory Commission. The fact that different components of the NF-83 rate may be used in transactions of the Intertie does not mean the Intertie Access Policy constitutes ratemaking. PG&E's citation to the Issue Alert provides no basis for suggesting the Policy modifies BPA's rates.

PG&E's final argument is that "The daily allocation of Intertie capacity under the proposed sharing method

would reduce the amount of nonfirm energy that BPA can offer with a guarantee of delivery, because BPA would be uncertain how much Intertie capacity would be available to it for NF-83 sales.” (Gardiner, PG&E, letter dated 8/10/84, p. 5.) PG&E’s argument assumes that BPA is required to guarantee delivery under its NF-83 rate schedule. To the contrary, there is no requirement that BPA guarantee any portion of nonfirm energy sold under the NF-83 rate. As the Administrator noted in his Record of Decision, 1983 Final Rate Proposal, at p. 301:

On the first and last working day of each week, or more often if BPA determines that it is appropriate, BPA will indicate the amounts of nonfirm energy available for delivery on a guaranteed basis. On the first working day of each week BPA will indicate the daily (and, if necessary, the hourly) amounts that it is willing to guarantee through at least the coming Friday. On the last working day of each week BPA will so indicate through at least the coming Tuesday. Such daily (or hourly) amounts may be as small as zero or as much as all the nonfirm energy BPA plans to offer for sale on such days. BPA may so offer to guarantee delivery of nonfirm energy offered for sale at the Standard rate, Spill rate, Displacement rate, or Contract rate.

(BPA Record of Decision, 1983 Final Rate Proposal, p. 301 (1983).)

The amount of guaranteed nonfirm energy the Administrator may offer is not fixed, but is subject to the Administrator’s discretion. Consequently, there is no basis for concluding that guaranteed sales would be

reduced under the Policy. PG&E has failed to establish any modification of BPA's rates resulting from the Policy.

Decision

The section D.2.d. provision objected to has been eliminated from the Policy.

The Intertie Access Policy is a policy for allocating capacity on the Intertie. The Policy does not establish or modify BPA's wholesale power or transmission rates. The requirements of section 7(i) of the Northwest Power Act, (16 U.S.C. §839e(i)), apply to ratemaking, not development of a Policy. Section 7(i) provides that "[i]n establishing *rates* under this section, the Administrator shall use the following procedures . . .". (Emphasis added.) The parties commenting on this issue provide no basis for concluding that the Intertie Access Policy constitutes ratemaking. Therefore, section 7(i) procedures are inappropriate for development of the Intertie Access Policy.

Issue #2: Summary of Comments

BPA maintains that the Intertie Access Policy is consistent with section 7(k) of the Northwest Power Act. SCE suggests that the Intertie Access Policy is inconsistent with the alleged requirements of section 7(k) of the Northwest Power Act to provide nonfirm energy to nonregional customers at the lowest possible rates. (Myers, SCE, letter dated 8/13/84, p. 8.) LADWP suggests that the Intertie Access Policy should be subject to a hearing at FERC under section 7(k). (Cotton, LADWP, letter dated 8/13/84, p. 2.)

Evaluation of Comments

SCE suggests that statements of BPA regarding the Intertie Access Policy are inconsistent with section 7(k) of the Northwest Power Act. SCE states that BPA has suggested the Intertie Access Policy will benefit Pacific Northwest ratepayers by assuring a more equitable division of benefits between California and the Pacific Northwest, that it would enable Pacific Northwest utilities with surpluses to increase their revenues from California sales, and that Congressional authorization of the Intertie was intended "to provide the lowest possible rates to Pacific Northwest consumers of Federal power." (Myers, SCE, letter dated 8/13/84, p. 4.) Notably, SCE is not criticizing the Intertie Access Policy itself, but rather a few of many possible effects of the Intertie Access Policy. SCE singles out benefits to the Pacific Northwest, but ignores benefits to California.

SCE's basic argument is that the potential benefits to the Northwest are inconsistent with the alleged statutory requirement "to provide nonfirm energy to nonregional customers at the lowest possible rates." SCE has misstated BPA's statutory obligations. Section 7(k) requires that *BPA's nonfirm energy rate* be consistent with the Bonneville Project Act, the Flood Control Act of 1944, and the Federal Columbia River Transmission System Act. The Flood Control Act of 1944 and the Transmission System Act provide that *BPA's rates* should be established to encourage the widest diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles. (16 U.S.C. §§825s and 838g.) This does not require the Administrator's rates to California alone to be the lowest possible rates, nor the

Administrator's rates to the Pacific Northwest alone. The statutes require that BPA's rates be set as low as possible consistent with sound business principles so long as they are cumulatively high enough to recover the Federal debt plus other costs, while encouraging the widest possible use.

SCE confuses the general effects on the market price that may result from the Intertie Access Policy with ratemaking, the process which establishes the prices BPA may lawfully charge for energy. As SCE well knows, BPA's established rates permit BPA to sell energy at a variety of prices, depending on market conditions.

Section 7(k) regards BPA ratemaking, not development of the Intertie Access Policy, which allocates Intertie capacity to utilities. This allocation is not a rate for nonfirm energy. Section 7(k) applies *only* to "all [BPA] rates or rate schedules for the sale of nonfirm electric power within the United States, but outside the region . . ." (16 U.S.C. §839e(i).) There is no authority to apply ratemaking standards to the development of a policy for allocation of access to transmission facilities. (See discussion regarding section 7(i) hearings, above.) For the same reasons, LADWP's suggestion that a hearing pursuant to section 7(k) must be held to review the Intertie Access Policy is contrary to law.

Decision

Section 7(k) provides statutory directives for the establishment of BPA's nonfirm energy rate for sales outside the Pacific Northwest, but within the United States. Section 7(k) does not apply to development of

the Intertie Access Policy. Development of the Policy does not constitute establishment of a BPA nonfirm energy rate for purposes of conducting a hearing under section 7(k) of the Northwest Power Act.

II. Preliminary Issues

A. Relationship to Other BPA Actions

1. Marketing Efforts — “Agency Sale”

Issue #1: Summary of Comments

PG&E and SCE maintain that implementation of the Near Term Intertie Access Policy will impede negotiations with BPA and other Pacific Northwest utilities for long term firm sales of power under what has been called the “Agency Sale.” (Gardiner, PG&E, letter dated 8/10/84, p. 7; Myers, SCE, letter dated 8/13/84, p. 20.) The current “Agency Sale” is an offer proposed by BPA to Pacific Northwest utilities for the disposal of surplus power.

Evaluation of Comments

PG&E and SCE urge that BPA abandon the Near Term Intertie Access Policy because they assert it could negatively impact negotiations for long term sales contracts between BPA and Pacific Northwest utilities and the Southwest utilities. (Gardiner, PG&E, letter dated 8/10/84, p. 7; Myers, SCE, letter dated 8/13/84, p. 20.) PG&E believes this Policy may forestall useful options. (Gardiner, PG&E, letter dated 8/10/84, p. 7.)

These comments are not well taken. The Intertie Access Policy is designed to foster sales of firm energy on a longer basis than has occurred in the past.

As these commenters know, BPA past practice has been, with limited exceptions, not to grant firm

transmission contracts on the Pacific Intertie. Unless BPA changes its past Intertie practices and develops an Intertie Policy, no agency sale can take place. These practices were designed to reserve Intertie capacity for the sale of nonfirm energy and helped assure that resource construction in the Pacific Northwest was undertaken for the purpose of meeting the firm loads of the Region, not for export to California.

As the Region moved into a planning surplus due to a decreased rate of load growth, the need arose to reexamine BPA's Intertie practices in light of changed circumstances. The Near Term Intertie Access Policy is the product of that reexamination.

Adopting a permanent policy to facilitate the sale of the region's surplus power on a long term basis is not feasible because a permanent Intertie Policy could significantly affect new resource development in the Pacific Northwest and Southwest. BPA may be required to prepare an environmental impact statement (EIS) on a permanent Intertie Policy. If an EIS were required, it could take up to 2 years to prepare.

In light of this, BPA plans to adopt an Intertie Policy for up to 2 years that does not significantly affect the environment. BPA expects to adopt such a Policy as soon as BPA completes an environmental assessment in 6 months. While BPA completes that assessment, BPA is adopting an interim Policy for 6 months. Environmental issues associated with this interim Policy are discussed elsewhere in this Record of Decision.

Continuing the sale of BPA economy energy at very low prices would make potential agency sales very difficult. California utilities would have very little incentive to enter into long term transactions when short term benefits were so high. Further, the Pacific

Northwest would have a very high incentive to find competing long term uses for BPA's economy energy because of low short term benefits.

To have continued BPA's past practice of refusing to allow firm transmission contracts on the Intertie would have presented the wrong signal to potential California buyers of the Region's firm surplus. Thus, an essential feature of the interim Intertie Access Policy is that it creates a priority for the sale of firm power from existing surplus resources for up to 2 years.

BPA strongly disagrees with the commenters' assertions that the interim Policy discourages agency and other sales of the Region's surplus. To the extent that the Intertie Access Policy results in higher prices for BPA economy energy, provides for the sale of surplus firm power during the near term, and begins a dialogue on the environmental effects of long term sales of Pacific Northwest surplus firm power, the Intertie Access Policy facilitates rather than impedes potential agency sales.

Even if the Near Term Intertie Access Policy has what BPA believes to be an unlikely negative effect on long term contract negotiations, that is outweighed by the necessity to resolve short term access issues, both for BPA's revenue outlook and to provide short term access certainty for Pacific Northwest utilities. In addition, BPA's proposal to implement this Policy at this time has received considerable support by Pacific Northwest utilities — those same utilities involved in the "agency sale." (Schultz, ICP, letter dated 8/10/84, p. 1; Garman, PGP, letter dated 8/9/84, p. 1; Brawley, PPC, letter dated 8/13/84; Nadal, PNGC, letter dated 8/13/84; Boucher, PP&L, letter dated 8/13/84, pp. 1

and 4; Bredemeier, PGE, letter dated 8/13/84; Bryan, WWP, letter dated 8/9/84.)

Decision

Unless BPA changes its past practices, no sale of the Region's firm surplus on a long term basis is possible. BPA believes that the benefits of the orderly process provided by this Policy to resolve short term issues, while at the same time beginning a dialogue and process to address long term issues far outweigh any possible negative impacts. Therefore, BPA believes it is essential and thus reasonable to implement this Policy at this time.

2. Additional Intertie Expansion

Issue #1: Summary of Comments

Several persons suggested that the Intertie Access Policy may adversely affect the proposed Intertie expansion. These commenters believe that higher prices for Pacific Northwest economy energy may result from adopting the Policy, and may reduce the expected benefits from additional Intertie expansion so as to jeopardize their investment in such expansion. (Myers, SCE, letter dated 8/13/84; p. 2; Gardiner, PG&E, letter dated 8/10/84, pp. 1 and 7; Imbrecht, CEC, letter dated 8/13/84, p. 5.) The Northern California Public Power Agency (NCPA), indicated that they were already to proceed with construction of additional Intertie capacity. (Pugh, NCPA, letter dated 8/13/84, p. 1.) The Wyoming Public Service Commission (WPSC) encouraged BPA and all Pacific Northwest utilities to pursue the construction of

additional Intertie capacity between Oregon and California. (Jacquot, WPSC, letter dated 8/10/84, p. 1.)

Evaluation of Comments

The California Energy Commission (CEC) and others argue that the Intertie Access Policy will erode the fundamental economic justification for Intertie additions and will eliminate opportunities for expanded purchases of Pacific Northwest power. (Imbrecht, CEC, letter dated 8/13/84, p. 5; Myers, SCE, letter dated 8/13/84, p. 2; Gardiner, PG&E, letter dated 8/10/84, pp. 1 and 7.) BPA recognizes the importance of assessing the expected benefits from a major investment such as that required for additional Intertie capacity. BPA has analyzed in depth the expected costs and benefits associated with expansion of both the AC and DC Interties. BPA studies show large benefits associated with those expansions even when utilizing the expansions only for nonfirm transactions. The potential for future firm transactions could substantially enhance these benefits. The Intertie Access Policy could result in some shift of benefits associated with nonfirm transactions, but also may substantially increase the benefit to California utilities by providing Intertie access for firm transactions. Even if the shift were dramatic, there are still ample benefits available to both regions. Congress has recently spoken to this issue, authorizing BPA to proceed with the DC Intertie uprate, and concluding the AC uprate also should proceed.

BPA has not been provided with cost/benefit analyses conducted by California utilities. Potential investors in additional Intertie capacity who may have

based their analysis of expected benefits on an assumption of continued availability of Pacific Northwest energy at prices substantially below cost have based their analysis on a faulty assumption. BPA hopes that potential investors have assumed realistic prices for economy energy purchases. BPA's analysis suggests that the proposed DC and AC expansion plans are overwhelmingly good investments for most California utilities. This is primarily the result of the low cost of constructing the proposed additional Intertie capacity as compared to other alternatives.

BPA believes that because the Pacific Intertie is an economic investment for California utilities, sufficient investors can be found to develop additional capacity. Potential investors include those utilities who have not enjoyed the benefits of owning a portion of the Pacific Intertie. The NCPPA stated that they, together with Sacramento Municipal Utility District (SMUD), are moving forward to cooperate with BPA, Western, and others on developing additional AC transmission. They further stated that BPA's Intertie Access Policy generally is consistent with the mutual goal of maximizing the sharing benefits between the two regions. (Pugh, NCPPA, letter dated 8/13/84, p. 1.)

Decision

BPA believes that its Intertie Access Policy will not impede the construction of additional Intertie capacity and may increase the benefits to both regions of Intertie expansion.

B. Relative Benefits

Issue #1: Summary of Comments

A number of commenters suggest that BPA's published information concerning the relative benefits to BPA and the Southwest from use of the Intertie is either misleading or inaccurate. (Myers, SCE, letter dated 8/13/84, pp. 12-17; Gardiner, PG&E, letter dated 8/13/84, pp 3-34; Cotton, LADWP, letter dated 8/13/84, pp. 6-10; Niggli, SDG&E, letter dated 8/13/84, p. 1.) Western requested that BPA add Western's purchases to Table 2 accompanying BPA's proposed policy. (Coleman, WAPA, letter dated 8/13/84, p. 5.) A number of commenters request that BPA establish a more equitable sharing of benefits between the two regions. (Sander, Clark, letter dated 8/10/84; Brawley, PPC, letter dated 8/13/84, p. 1; Driscoll, MPSC, letter dated 8/19/84, p. 2.)

Evaluation of Comments

BPA has published information in a BPA Issue Alert concerning the benefits that have accrued to California through purchases over the Intertie in comparison to the revenues received by BPA for sales to California. (BPA Issue Alert, Update: BPA's New Intertie Access Policy, 7/84.) BPA regrets that certain information contained in this document was incorrectly characterized. That information is clarified below. BPA also included information about benefits in the discussion accompanying BPA's proposed Intertie Access Policy. That information also is clarified below.

Several California commenters argue that comparison of benefits is irrelevant to the Intertie Access

Policy. BPA disagrees with the general assertion. However, BPA agrees that the authority to adopt a policy is not dependent on any particular ratio of benefits between Pacific Northwest and Southwest utilities.

BPA acknowledges that California utilities propose different methods for calculation of benefits. See, for example, the comments of PG&E (Gardiner, PG&E, letter dated 8/10/84, p. 4) which encourage BPA to consider value based on alternative purchases available to PG&E rather than fuel costs. These arguments have been made in great detail before BPA and FERC. BPA has considered these arguments, and stands by the testimony and argument BPA presented in the recent 7(k) hearings and briefs.

Decision

The discussion of benefits that appeared in BPA's proposed Near Term Intertie Access Policy were an approximation of the value accruing to California utilities resulting from purchases in FY 1983 under BPA's NF-2, CF-2, SP-1, SE-1 rates, and purchases of obligation energy under the capacity-energy exchange. The total of \$1.0 billion in value to California purchasers includes roughly \$934 million calculated value of nonfirm energy purchases based on California fuel costs, \$8 million calculated value of seasonal capacity purchases, \$4 million calculated value of purchases of obligation energy, and \$49 million calculated value of firm surplus purchases based on alternative fuel costs. This figure does not include wheeling benefits, capacity-energy exchange benefits, stability benefits, reserve benefits, and others. BPA acknowledges that these figures are rough approxima-

tions and that different parties may propose different methods for the calculation of benefits. BPA believes, however, that these figures reasonably represent the range of benefits enjoyed by California purchasers. The \$0.2 billion amount represents the actual amount paid to BPA. Under any method of comparison, the benefits to California outweigh the benefits to BPA.

The summary of benefits that appeared in BPA's Issue Alert entitled "Update: BPA's New Intertie Access Policy" is in error. The Issue Alert stated that in 1983 total benefits to California were \$1.6 billion while BPA received \$0.3 billion in revenues. A correct statement of BPA's position is that over the NF-1 and NF-2 periods combined, benefits to California utilities from economy energy purchases were \$1,521 million. BPA received a total of \$269 million in revenue from these sales. As BPA testimony in the 7(k) proceeding before the Federal Energy Regulatory Commission described these benefits, during the NF-1 period, California utilities realized savings of more than \$744 million while BPA realized \$127 million in revenues. Under NF-2, Pacific Southwest utilities saved more than \$777 million while BPA realized revenues of \$142 million. These figures do not include any consideration of value to California or revenue to BPA from sales of seasonal capacity, surplus firm power, the capacity-energy exchange, or other benefits.

C. Environmental Impact Assessment Issues

Issue #1: Summary of Comments

At the same time that BPA is assessing the environmental effects of a proposed 18-month Near Term Intertie Access Policy, BPA is adopting a Policy

for 6 months. Pacific Northwest environmental interests, such as the Northwest Conservation Act Coalition (NCAC), expressed the following opinion: "The proposed two-step process, of an interim and an eventual final policy, seems to us a particularly graceful way to insure a rational use of the Intertie in the short term while not precluding any desirable options in the long term." (Stearns, NCAC, letter dated 8/9/84, p. 1.) A similar opinion was voiced by Solar Oregon Lobby (SOL) and Seattle City Light (SCL). They believe that the multi-step process is an opportunity to test the concept and provide advance notice of BPA policy direction. (Saven, SCL, letter dated 8/13/84, p. 1; Heutte, SOL, letter dated 8/13/84, p. 1.)

Some California utilities, however, stated that BPA must consider the environmental impacts of the interim Near Term Intertie Access Policy prior to its adoption, and that an environmental assessment (EA) or environmental impact statement (EIS) should be prepared prior to the initial implementation. (Myers, SCE, letter dated 8/13/84, p. 11; Cotton, LADWP, letter dated 8/13/84, p. 3; Niggli, SDG&E, letter dated 8/13/84, p. 3; Gardiner, PG&E, letter dated 8/13/84, p. 8.) In contrast, the Montana Public Service Commission (MPSC) believes that BPA should adopt a long term Policy immediately, rather than waiting 2 years until an EIS is completed. (Driscoll, MPSC, letter dated 8/10/84, p. 3.) SCE suggested that by bifurcating the policy and the consequent environmental review, into near term and long term proposals, BPA might not be complying with the National Environmental Policy Act (NEPA). (Myers, SCE, letter dated 8/13/84, p. 11.)

Two California utilities and an individual expressed concern that the allocation provisions in the Policy will cause major changes in the types of resources that will be operated in the Pacific Northwest and the Southwest. They believe this should be evaluated prior to adoption of the Intertie Access Policy. They claim to be concerned that some of these changes will result in inefficient operations, causing environmental impacts and consequent harm to national interests. (Myers, SCE, letter dated 8/13/84, p. 17; Gardiner, PG&E, letter dated 8/10/84, p. 6; Meek, letter dated 8/20/84, pp. 1-3.) Several California utilities believe that the Intertie Access Policy, because of the pro rata nonfirm allocation and its alleged effect on price, could result in increased thermal generation in the Pacific Northwest at times when hydro generation may be available in the Pacific Northwest and Canada to provide the necessary power. (Gardiner, PG&E, letter dated 8/10/84, p. 6; Meek, letter dated 8/20/84, p. 5; Cotton, LADWP, letter dated 8/13/84, p. 5; Heutte, SOL, letter dated 8/13/84, p. 1; Whitney, LADWP, TR 178-79.)

Some of these California utilities also believe that Southwest thermal generation will increase as a response to the change in allocations. A Pacific Northwest utility believes, however, that the terms of the policy may in fact displace more oil generation in the Southwest. (Saven, SCL, letter dated 8/13/84, p. 1.) Another Pacific Northwest utility representative was of the opinion that the major impact of the Near Term Intertie Access Policy is to determine which utilities make sales to California and whether those sales are firm or nonfirm. He concluded that this Intertie Access Policy would not change the actual mix of resources operating and thus, BPA should consider

the possibility that there may be no environmental effect. (Schultz, ICP, TR 175-77.)

Evaluation of Comments

The commenters from environmental organizations have supported the BPA multistep proposal, and have commended BPA for its approach as being reasonable and practical. (Heutte, SOL, letter dated 8/13/84, p. 1.) BPA agrees that a multistep process is a "graceful way to insure a rational use of the Intertie in the short term." (Stearns, NCAC, letter dated 8/9/84, p. 1.)

Some of the foregoing California commenters express a concern for environmental impacts that they allege may occur if an increase in thermal plant operation results from the economic aspects of the interim adoption of the Near Term Intertie Access Policy. This concern contrasts with BPA's understanding that operation of thermal resources contributes only a small fraction of the air pollution in most airsheds in California. Automobile exhaust is thought to be the major contributor to air pollution. Thus, the speculative additional incidental operation of thermal plants in the Southwest is unlikely to result in noticeable change in air quality.

It is significant to note that this concern for the environment is being expressed most strongly by those who believe that the Intertie Access Policy adversely affects their economic interest. These commenters have the most to gain by a delay in adoption of the Intertie Access Policy until an EA or EIS could be prepared. Other California entities believe their economic interests may be improved by the Intertie

Access Policy and would like to see the long term Policy implemented soon. (Pugh, NCPPA, letter dated 8/13/84, pp. 1 and 4.) Environmental groups that commented did not express concern as did the California utilities. This suggests that it is the utilities' economic interests that are the true interests they are seeking to protect. NEPA was not designed to protect economic interests.

Immediate application of the proposed Near Term Intertie Access Policy is necessary so that BPA will have an allocation procedure in place during the fall and winter months when river conditions most often result in Conditions 2 and 3. These are conditions under which BPA presently has no allocation method in place. Normally, in the spring and summer months, the availability of surplus energy as a result of spring runoff gives rise most often to Condition 1 under which Intertie capacity is allocated under the Exportable Agreement. Not to implement the Policy at this time would delay any real experience under the proposed Near Term Intertie Access Policy for about 1 year.

BPA has chosen this multi-step process for more than that reason. The delay in implementing the Policy pending completion of the environmental review of a Near Term Intertie Access Policy could result in the loss of significant amounts of revenue that may jeopardize BPA's ability to repay the Federal Treasury the amount BPA projected it would pay at the end of 1985. BPA runs a risk that an interest penalty may be imposed on future borrowings from the Treasury if BPA does not meet its projected Treasury payments for reasons within BPA's control. (16 U.S.C. §838k.)

It is appropriate to review what the interim Policy does not do. It will not limit the choice of reasonable alternatives nor prejudice the ultimate decision on a 18-month Policy because there will be no irreversible or irretrievable commitment of resources as a result of the 6-month adoption. In 6 months, BPA can return to past practices, extend the interim Policy or modify the Policy in any manner. None of those options are precluded as a result of the interim Policy.

The interim Policy will not change the environmental status quo. It will not alter any operational constraints, limitations, or the terms and conditions of any permits or licenses. The operation of the FCRPS will continue to be within existing and long established constraints. All generating resources will continue to operate within provisions of existing licenses or permits. The environmental status quo will remain unchanged for the following reasons:

- (1) The interim application of the Policy will be in effect for only 6 months.
- (2) There will be no change in planning for the construction of thermal or any other energy resources in the Pacific Northwest or the Southwest as a result of the interim application of the Policy, because no new resources are allowed on the Intertie.
- (3) No transmission facilities or structures of any other kind will be erected, torn down, or modified as a result of the Policy.
- (4) There will be no effect on FCRPS operating constraints, which include provisions to protect fish and wildlife, such as minimum flows for adults spawning. Violation of these constraints will not occur as a result of the Policy.

- (5) No adverse effects on fish and wildlife will result from the adoption of the Policy. BPA included provisions in the Policy that permit BPA to deny access to any energy resource that may have deleterious effects on BPA's efforts to protect, mitigate, and enhance the fish and wildlife resources of the Columbia River Basin. If any such adverse effects to BPA efforts on behalf of fish and wildlife are demonstrated, the Administrator will deny further access unless the energy resource is modified to alleviate the effect, or the resource sponsor takes offsetting measures not inconsistent with the Council's Fish and Wildlife Program.
- (6) The overall amount of power sold over the Intertie will not be significantly increased under of [sic] the Policy over what it would be otherwise. Pacific Northwest sellers and Southwest buyers will seek, as they do now, to fill the Intertie as much of the time as possible by negotiating mutually satisfactory prices.

Some California commenters suggest that circumstances might arise where higher prices for Pacific Northwest nonfirm would result in the operation of thermal resources in California in lieu of purchasing higher cost allegedly cleaner hydro power from the Pacific Northwest. This is not likely to occur because of the higher cost to operate Southwest thermal resources than to operate Pacific Northwest hydro resources under most market conditions. It is theoretically possible that some higher cost thermal resources may operate in lieu of lower cost hydro power. However, it will usually be in the interest of the Pacific Northwest sellers to lower prices by displacing

the operation of thermal resources in order to capture the benefits of selling power, thereby minimizing the possibility.

With respect to the operation of thermal plants in the Pacific Northwest, some California commenters suggest that instances could arise where a utility may operate a thermal resource that would not be operated were the price for nonfirm energy lower. Thus, they argue, to the extent that the interim adoption of the Policy results in higher prices for nonfirm energy, some operation of thermal resources may occur that would not otherwise have occurred in the absence of the interim adoption of the Policy. Of course, under the environmental status quo, such thermal operation is permitted within the limits of the operators' licenses. No greater impact will occur than that which the law presently allows. Furthermore, any impact the adoption of the Policy might have on the operation of an individual thermal facility would be within the range of variation in operations that normally occur with the Pacific Northwest power system that result from yearly, seasonally, daily, and hourly load/resource circumstances. Nevertheless, some California commenters speculate that greater thermal operation may result under the interim adoption of the Policy than would otherwise occur. The likelihood that such operation would occur is reduced by a number of factors.

First, BPA sells nonfirm energy at very low rates designed to be less than the costs of generating energy from Pacific Northwest thermal plants. Thus, only when the market price is very strong will these thermal resources operate. This possibility will be reduced because of the increased supply of hydro power if river

flows are high this fall. At this time it would be purely speculative to attempt to quantify the amount of additional thermal generation that will actually occur. Thus, thermal plants will operate within normal ranges, resulting in no changes to the environmental status quo beyond those that would occur in the absence of the Policy.

Second, occasional operation of Pacific Northwest thermal plants beyond levels at which they would otherwise operate, in the absence of the Policy, would produce minimum adverse air quality effects. This is true because these plants generally are located in areas of good air quality. However, these effects are purely speculative; it is not possible to quantify them; they may not occur at all and if they occur, they will be within the permissible existing operating parameters.

It is clear that an Intertie sale would only be economical for a thermal resource owner if the price received, net of the costs of production, were greater than the savings achieved by displacement. Under current nonfirm rate structures, Pacific Northwest thermal resources that do not qualify for displacement cost nearly the same to operate for export sale to California, with transmission charges, as Pacific Northwest hydro resources.

In addition, operational constraints on thermal resources, which will be primarily coal-fired generation, such as the inability to start up or shut down on short notice or for short periods, combined with the inherent interruptibility of nonfirm sales and the 1-day notice period for allocation under the policy, lessen the ability of the owners of coal plants to generate nonfirm power for export. Interim adoption of the Policy does not improve the ability of the owner

of a thermal plant to plan to enter the economic energy market by selling thermal power. The thermal plants that are most likely to participate in the export market are those that require only incremental increases in generation at already operating plants. These slight changes would be within the restrictions of applicable licenses and permits, with no changes to the overall environmental status quo beyond those that would occur in the absence of the Near Term Intertie Access Policy.

Third, BPA expects that a secondary market may develop in the Pacific Northwest where sellers of lower cost power, which is in excess of the [sic] their Intertie allocation, sell power to other Pacific Northwest utilities with allocations to displace operation of higher cost resources. Thus, BPA expects that any environmental effects would be well within the range of effects that would occur were BPA to continue its current Intertie Access practices.

Fourth, the impacts associated with the interim application of the Policy appear to be almost exclusively economic, and such impacts are not environmental impacts within the meaning of NEPA.

Decision

BPA has implemented the Near Term Intertie Access Policy on an interim basis without first preparing an EA or EIS because there will be no changes in the overall environmental status quo beyond those that would occur in the absence of the Policy. Even if there may be intrinsic environmental effects, the effects are impossible to quantify, are remote from the interim adoption, and are so speculative as not to be

reasonably meaningful to the underlying decision on interim application. There is no prejudice to the ultimate decision or preclusion of reasonable alternatives of an 18-month Near Term Intertie Access Policy to be adopted following environmental review, since there is no irreversible or irretrievable commitment of resources made as a result of interim adoption of the Policy.

D. Optimal Use of Resources

Issue #1: Summary of Comments

Several commenters expressed the view that the Intertie Access Policy will result in an inefficient allocation of resources to serve the economy energy market. PG&E said that higher prices resulting from the Intertie Access Policy will result in a waste of fossil fuels in the Pacific Northwest and Southwest. (Gardiner, PG&E, letter dated 8/13/84, pp. 6-7.) Another commenter expressed the view that allocating Intertie capacity without regard to expected price, the cost of the resource, or the environmental effect would result in an inefficient use of resources. (Meek, letter received 8/21/84, pp. 1-3.) The DSIs suggested that BPA adopt an Intertie Access Policy that reserves sufficient Intertie capacity to sell all of BPA's surplus so as to optimally use BPA's resources and avoid sales at distressed prices. (Wilcox, DSI, letters dated 8/13/84 and 3/15/84, p. 2.) The DSIs went on to assert that it is not an efficient use of exchange resources to sell them at less than their fully allocated cost. (*Id.*)

Evaluation of Comments

BPA agrees that sales of exchange resources at distressed prices, the bulk of BPA's firm power surplus, is not an optimal use of BPA's resources. It is less than optimal because distressed prices enable the buyer to purchase surplus firm power as economy energy. Using firm power to serve an economy energy market is not the highest and best use of firm power. As discussed elsewhere in this Record of Decision, one of the objectives of the Intertie Access Policy is to permit Pacific Northwest utilities to sell firm power. This promotes optimal use of resources by encouraging firm power to be put to higher and better uses than is presently the case.

Low prices for Pacific Northwest energy create a disincentive for buyers to enter into long term contracts to purchase firm energy because low prices encourage the continuation of short-sighted strategies among buyers. This results in increased financial pressure on Pacific Northwest utilities to develop other markets in the Pacific Northwest for their surplus firm power at higher prices. This pressure has already manifested itself in the form of BPA's sale of surplus energy to the DSI's for their incremental loads. BPA also had offered lower priced energy through its customers for the benefit of farmers who increase their irrigation load and to displace alternative fuel sources of other consumers. Some Pacific Northwest utilities are considering assistance to commercial entities to induce them to install electric boilers to displace other fuels used to produce industrial process steam.

Building permanent load to absorb a portion of the Region's firm surplus may not be the most efficient use

for the Region's surplus firm power. Using the Region's surplus to serve existing firm loads in the Southwest is a better use of such energy. However, unless the seller can recover the cost of producing firm power through such sales, alternatives such as those listed above may seem more attractive.

As is discussed elsewhere in the Record of Decision, BPA believes that the market for Pacific Northwest economy energy is not functioning efficiently. This is in part because of the surplus supply of firm energy and in part because of the access policies of the owners of the southern Intertie. The Intertie Access Policy partially alleviates this latter problem by providing Pacific Northwest sellers with market power comparable to that enjoyed by the buyers of Pacific Northwest energy who own a share of the southern Intertie. This generally should improve efficiency in the use of Pacific Northwest resources.

Several observations can be made with regard to the efficient allocation of resources to serve the economy energy market under the Intertie Access Policy. First, a Pacific Northwest thermal resource used to serve the economy energy market is displacing some other more expensive resource. To the extent that price is a measure of efficiency, resource efficiency will occur. Second, while suggestions that thermal resources may serve the economy energy market at times when cheaper hydro power is available may be true under certain circumstances. However, nothing in this Policy prevents a utility with hydro power in excess of its allocation from offering to sell its excess to another Pacific Northwest utility to displace a thermal plant being operated for export at prices below the incremental cost of the thermal plant. In fact, BPA

expects the Intertie Access Policy to result in a secondary market where hydro power is sold to displace thermal resources and the purchaser instead will sell the hydro over their allocation. BPA has for a long time competed in this market and has established low rates to do so. For example, in addition to the Spill rate, BPA has established Displacement rates at 7.0 mills and 3.0 mills for displacement of coal and nuclear plants, respectively. BPA would expect other utilities to do the same. BPA recognizes that transmission costs of a mill or two are a transaction cost of participating in this market. Of course a utility may choose to wait out the market in hopes of a larger allocation and better prices at some future time.

A memorandum was received by BPA on August 21, 1984, from Daniel Meek, Counsel to the House Subcommittee on Mining, Forest Management, and BPA. This memorandum raises issues that may be considered more appropriately in the development of the Long Term Intertie Access Policy or the deliberations regarding extension of the proposed Policy to the full 2 years. The memorandum suggests that the proposed Policy would inefficiently allocate access among Pacific Northwest utilities, and proposes that an alternative could be developed that would provide a free market in Pacific Northwest/California power transactions. The alternative suggested seeks to achieve a result where there is assurance that transactions between the Pacific Northwest and the Southwest always displace the highest-cost displacable California resources with the lowest-cost Pacific Northwest resources that could be operated. It is suggested that this be done by a computer-operated system that achieves this result on an hourly basis.

BPA agrees that neither the present system of transactions between the Pacific Northwest and Southwest nor the adoption of the Near Term Intertie Access Policy can assure optimum economic operation of Pacific Northwest and Southwest resources. To strive to do so is a desirable goal. However, this system must be viewed as a long term objective since the existing framework of contracts, Intertie ownership, and relatively independent operation of the approximately 150 utilities involved cannot be quickly modified. The proposed Policy provides mechanisms that encourage efficient resource operation. Mr. Meek's comments will be carefully considered in refining the Near Term Policy and in the development of a Long Term Intertie Access Policy.

Decision

BPA believes that on balance, the Near Term Intertie Access Policy will improve the efficient use of Pacific Northwest resource by promoting the application of the Region's surplus firm power to higher and better uses. BPA generally expects the economy energy market will be served with least cost resources through the development of secondary markets in the Pacific Northwest to displace more costly resources that would otherwise be operated for export.

E. Existing Pacific Northwest Resources

1. Introduction

BPA's proposed policy defined "Existing Pacific Northwest resources" to mean: "the resources of Pacific Northwest utilities which are in operation or

dedicated to regional load in recognized regional resource planning documents, and which have not been terminated, prior to the effective date of this policy." (Draft Policy at 15.)

2. Existing Resources

Issue #1: Summary of Comments

Most commenters urged that the Near Term Intertie Policy exclude new resources from access. (Reed, MEIC, letter dated 8/10/84, p. 2; Stearns, NCAC, letter dated 8/9/84, p. 1; Evans, NMFS, letter dated 8/13/84, p. 2; Cavanagh, NRDC, letter dated 8/13/84, p. 5; Jacquot, WPSC, letter dated 8/8/84; p. 2.) Some comments criticized the definition of existing Pacific Northwest resources for vagueness. (O'Banion, SMUD, letter, dated 8/10/84, p. 4; Pugh, NCPPA, letter dated 8/13/84, p. 3.)

However, many commenters felt that a general exclusion of new resources should not necessarily apply to cogeneration resources. (Colbo, NPPC, letter dated 8/10/84, p. 2; Boner, NP&P, letter dated 8/8/84, p. 2; Canon, ICNU, letter dated 8/13/84, p. 1; Van Curen, AWPPW, letter dated 8/10/84, p. 1.) The Industrial Customers of Northwest Utilities (ICNU) believe that there should be flexibility to sell cogenerated power over the Intertie, instead of creating a surplus, so as not to mislead potential developers. (Canon, ICNU, letter dated 8/13/84, p. 2.) The WPSC believes that BPA should suspend acquisitions of small resources until the pricing structure is more realistic. (Jacquot, WPSC, letter dated 8/8/84, p. 2.)

BPA's proposed definition of existing Pacific Northwest resources contemplated that some planned utility resources could qualify for access if they were dedicated to regional load in "recognized regional resource planning documents." Several commenters suggested that instead, planned resources be given access only if included in the Northwest Power Planning Council's Plan. (Thatcher, NWF, letter dated 8/13/84, p. 1; Stearns, NCAC, letter dated 8/9/84, p. 1; Cavanagh, NRDC, letter dated 8/13/84, p. 6; Toole, letter dated 8/9/84, p. 1; Reed, MEIC, letter dated 8/10/84, p. 1.)

Evaluation of Comments

The comments supporting the exclusion of new resources from access generally were based on a concern that Intertie Access Policy not create an incentive for any additions to the present surplus of generation resources. (Jacquot, WPSC, letter dated 8/8/84, p. 2.) A number of comments asserted that the policy should hold out no possibility that Intertie access could be gained for new resources. (Cavanagh, NRDC, letter dated 8/13/84, p. 5; Reed, MEIC, letter dated 8/10/84, p. 2; Evans, NMFS, letter dated 8/13/84, p. 2.) Although not explicitly stated, many comments inferred that access should not be provided blindly to new resources with unknown or ill-defined environmental consequences.

Sponsors of cogeneration urge that new cogeneration resources be an exception to this general rule because of special advantages of cogeneration. They maintained that cogeneration could be a "lost opportunity" if not developed now, and could be available to meet the possible unavailability of planned

resources such as Supply System Plants 1 and 3. The ICNU noted that natural gas turbine cogeneration may be developed at a low enough cost to be cost-effective for internal use by industries. However, the ICNU felt that it would be better served if this resource could be sold over the Intertie rather than be used by local industries, thereby exacerbating existing surpluses. (Canon, ICNU, letter dated 8/13/84, pp. 1-2.) Continuing this argument, one commenter maintained that cogeneration enhances the economics of some industries, and therefore can create regional economic and employment advantages. (Van Curen, AWPPW, letter dated 8/10/84, p. 1.) To further encourage cogeneration one commenter urged that the Near Term Intertie Access Policy state that the Long Term Intertie Access Policy would provide access for cogeneration resources. (Boner, NP&P, letter dated 8/7/84, p. 2.)

The Northwest Power Planning Council (NPPC) urged that BPA's Near Term Policy recognize the Council's Plan regarding cogeneration resources that could be lost to the region for lack of access to California markets. (Colbo, NPPC, letter dated 8/11/84, p. 2.) However, the Council noted that it was not aware of any such potential cogeneration, and understood that projects started within the next 2 years may not be operational within the term of the Near Term Intertie Access Policy.

The NCAC believes that new generating resources, except those acquired under the Public Utilities Regulatory Policies Act of 1978 (16 U.S.C. §1332 *et seq.*, hereinafter PURPA), will not have access to the Intertie. (Stearns, NCAC, letter dated 8/9/84, p. 2.) But the Idaho Power Company (IPC) believes that under the proposed Policy a situation may arise in

which a utility may be denied access to the Intertie because a PURPA resource, required to be purchased by that utility, was inconsistent with BPA's Fish and Wildlife Program. (Barclay, IPC, letter dated 8/13/84, pp. 14-15.) The Natural Resources Defense Council (NRDC) believes that a denial of access for a required purchase is unfair since the purchase is a necessary concession to state and Federal law. (Cavanagh, NRDC, letter dated 8/13/84, p. 7.) Some parties also believe, however, that PURPA does not require BPA to provide access to the Intertie. (Thatcher, NWF, letter dated 8/13/84, p. 2; Cavanagh, NRDC, 8/13/84, p. 7.)

The comments criticizing the proposal to rely on "recognized regional planning documents" were well-founded. BPA agrees that the 6-month Policy should be restricted to resources that are operational on the effective date of the Policy.

Decision

BPA's Near Term Policy has been changed to allow access only for existing resources operational on the effective date of the Near Term Policy. BPA's Near Term Policy is neutral with respect to cogeneration and PURPA resources.

3. Resources Owned by Nonutility Entities

Issue #1: Summary of Comments

The proposed definition of "Existing Pacific Northwest Resources" referred only to utility-owned resources. (Draft Policy at 15.) Several commenters suggested that this should include nonutility-owned resources, provided that Intertie access would be

accomplished by an arrangement with the local scheduling utility. (Nadal, PNGC, letter dated 8/13/84, p. 1; Hoehne, LFC, letters dated 8/9/84 p. 1 and 2/27/84; Boner, NP&P, letter dated 8/7/84, p. 2; McKinney, Cowlitz, letter dated 8/9/84, p. 1; Canon, ICNU, letter dated 8/10/84, p. 2; Wilcox, DSI, letter dated 3/15/84, p. 5; Coleman, WAPA, letter dated 8/13/84, p. 5.) Other commenters felt that the basic premise of limiting access to scheduling utilities was sound. (Schulz, ICP, letter dated 8/10/84, p. 2; Labrie, MPC, letter dated 8/13/84.)

Evaluation of Comments

Some comments acknowledged that contracts already exist between cogenerators, scheduling utilities, BPA and California markets. One example is the contract between Longview Fibre Co. (LFC) and Western. (Van Curen, AWPPW, letter dated 8/8/10/84; Coleman, WAPA, letter dated 8/13/84, p. 5; McKinney, Cowlitz, letter dated 8/9/84, p. 1; Hoehne, LFC, letter dated 8/9/84 and 2/27/84.) The Longview Fibre Contract provides for the sale of Longview's cogenerated power to Western, with access to the Intertie provided through Cowlitz Public Utility District (Cowlitz). (Hoehne, LFC, letters dated 8/9/84, p. 1 and 2/27/84, p. 2.) BPA did not intend to exclude these resources from access.

The Pacific Northwest Generation Company (PNGC) recommended language to the effect that "nonscheduling utility resources will qualify for firm Intertie access if proper arrangements are made through a scheduling utility." (Nadal, PNGC, letter dated 8/13/84, p. 1.) The DSIs suggested that all arrangements for access to the Intertie be made by, or

through, utilities with generation control because neither BPA nor the utilities can assume responsibilities for others without suitable contracts. (Wilcox, DSI, letter dated 3/15/84, attachment 1, p. 5.) These are reasonable suggestions, which BPA's Policy incorporates.

Decision

The definition of existing Pacific Northwest resources is changed to make clear that existing resources owned by entities other than utilities may gain access to the Intertie if the resource is operational on the effective date of the Policy and had an established relationship with a scheduling utility to serve regional load. An entity that is not a scheduling utility, but that desires access to the Intertie, must do so by or through a scheduling utility.

4. Enforcement

Issue #1: Summary of Comments

The draft Policy provided that utilities specify the resource to be used to make a sale before assured delivery would be provided for new firm sales contracts, but did not otherwise provide for the identification of the sources of power being transmitted over the Intertie.

Some commenters said that BPA needed an enforcement mechanism to exclude undesirable resources from benefiting *de facto* from Intertie access by operating ostensibly to serve domestic load, thereby allowing other resources to be used for Intertie sales. They maintained that this "laundering" would subvert

the policy. (Reed, MEIC, letter dated 8/8/84, p. 1; Thatcher, NWF, letter dated 8/10/84, p. 2; Cavanagh, NRDC, letter dated 8/13/84, pp. 6-8; Thatcher, NWF, TR 276-277.)

NPPC and National Marine Fisheries Service (NMFS) pointed out that the draft policy failed to provide a means of identifying the sources of power being transmitted over the Intertie. (Colbo, NPPC, letter dated 8/10/84, p. 2; Evans, NMFS, letter dated 8/13/84; Bodi, NMFS, TR 294.) National Wildlife Federation (NWF) believes that the "anti-laundersing" provision must apply to resources that do not meet the Policy's fish and wildlife conditions, as well as to those that are not within the definition of "existing resources". (Thatcher, NWF, letter dated 8/10/83, p. 2.) Columbia River Inter-Tribal Fish Commission (CRITFC) and NMFS believe that the Policy is flawed in not guaranteeing that "dirty" resources will not be laundered in a manner that permits Intertie marketing of otherwise ineligible resources. (Wapato, CRITFC, letter dated 8/13/84, p. 1; Evans, NMFS, letter dated 8/13/84, pp. 1-2; Hemple, SOL, letter dated 8/13/84, p. 1.) Another commenter saw no need to set any sort of conditions for access because no new resources would be expected to come on line during the 6 months of the interim Policy. (Copp, *et al.*, Chelan, letter dated 8/10/84, p. 2.)

CRITFC and NMFS suggest that BPA should prepare monthly reports summarizing use of the Intertie by utility and by resource. (Wapato, CRITFC, letter dated 8/13/84, p. 1; Evans, NMFS, letter dated 8/13/84, p. 1; Bodi, NMFS, TR 294.) NMFS suggests that a list of resources be submitted by each scheduling utility that would certify that the resources on the list

do not adversely affect fish and wildlife. (Bodi, NMFS, TR 294; Evans, NMFS, letter dated 8/13/84, pp. 2-3.) The fish and wildlife agencies and Tribes would be given 30 days to consult with BPA over the list and the resource operator or owner would submit an annual compliance report.

Evaluation of Comments

Commenters believed that resources that BPA would not allow on the Intertie may be used to serve loads within the Pacific Northwest, thereby freeing up other acceptable resources for Intertie transactions. They felt this would encourage the operation of resources that otherwise would be incompatible with BPA's and the Region's best interests. Comments referred to the problems of identifying the source of energy transmitted over the Intertie when some of the utility's resources are operated for Intertie sales and others are operated to serve domestic loads. It was said that if a resource were disqualified for Intertie access, but was operated for domestic loads at the same time as Intertie sales were being made, the output of the disqualified resource would be "laundered" and the Policy would not achieve its objective. Suggested enforcement mechanisms included BPA denial of Intertie access to a utility that constructs, operates, or acquires new resources. (Reed, MEIC, letter dated 8/8/84, p. 1.) NRDC suggested that BPA either bar the utility from access or reduce its Intertie access by the amount of the generation from the nonqualifying resources. (Cavanagh, NRDC, letter dated 8/13/84, pp. 6-7.) However, the NWF and the NCAC noted that a utility should not be penalized if it were required to purchase a new facility qualifying under PURPA. (Thatcher,

NWF, letter dated 8/10/84, p. 2; Stearns, NCAC, letter dated 8/9/84, p. 1.) (PURPA issues are addressed under the section titled Resources Owned by Nonutility Entities.)

BPA agrees with the NPPC, NMFS, NWF, CRITFC, and NRDC that a means to identify the sources of power actually transmitted over the Intertie is a desirable component of the Policy. This will help not only as a means of effecting both the fish and wildlife provisions and to assure that unqualified resources are not gaining access. BPA does not see the value of preparing monthly reports by utility and by resource use of the Intertie, particularly since system sales are made on an hourly basis from utilities resource mixes, not from one particular source on a constant basis. A list of new resources would serve no purpose because only existing resources are allowed access under the Policy. (See discussion in the section of this Record of Decision on fish and wildlife.) Since the Policy provides a means to discover such information on an as needed basis, routine reporting would merely assure the proliferation of data, very little of which would be of use in implementing the Policy.

BPA agrees with the view that some remedy should be imposed by noncompliance with the Policy. BPA believes that reasonable remedies include denial of access for a resource, refusal to accept schedules, or reduction of allocation. Appropriate remedies will be imposed after a reasonable opportunity to correct noncompliance.

Decision

BPA has added a remedies section to the Policy, indicating a selection of remedies BPA may employ. BPA will require a utility that makes use of the Intertie to provide such information on the resources operating and those used to serve load during given periods as may be requested by BPA. BPA may require this information before or after Intertie schedules are made. The information provided will be made available to the public, unless clearly identified as proprietary with appropriate explanation. Reports of actual or planned operation will include all the utility's resources, not just those scheduled for Intertie sales. This information could be used to identify amounts of power that should be deleted from a utility's Intertie schedule. However, the existence of this checking mechanism should be a strong disincentive so that reduction of Intertie schedules would be rare. A similar problem was addressed by the Intercompany Pool (ICP) with respect to extraregional power. Because the impermissible action by one utility will reduce all other utilities' allocation, other utilities will have an interest in preventing subterfuge. (Schultz, ICP, letter dated 8/10/84, p. 8.)

F. Economic Override

Issue #1: Summary of Comments

BPA's initial proposal included an "economic override" provision. This provided that under Conditions 2 or 3 of the Intertie Access Policy a Southwest purchaser could submit evidence to BPA to demonstrate that neither that particular purchaser nor any

other purchaser could economically purchase power from a particular Pacific Northwest seller with allocated Intertie capacity. The basis of this showing would be that the seller's price exceeded the highest cost displaceable thermal resource otherwise available to serve the purchaser's load. Upon this demonstration, BPA would reallocate the would be seller's Intertie capacity to other Pacific Northwest utilities if the particular seller would not lower its price. (Draft Policy at section II.D.2.d.)

This proposal generally was criticized by both Pacific Northwest and Southwest parties for its potential administrative complexities and technical difficulties. For these reasons many parties urged the elimination of this provision from the Policy. (Bredemeier, PGE, letter dated 8/13/84, p. 2; Bryan, WWP, letter dated 8/13/84, p. 2; Pritchard, LADWP, TR 142-48; Fiske and Long, PG&E, TR 148-54; Myers, SCE, letter dated 8/13/84, pp. 20-21; Garman, PGP, letter dated 8/13/84, p. 4.) Western suggested that BPA defer to the Southwest purchaser's determination of the highest price it could economically afford and override the Pacific Northwest utility's allocation. (Coleman, WAPA, letter dated 8/13/84, p. 5.)

Evaluation of Comments

BPA proposed the economic override provision to overcome the unlikely circumstance that would result should the market system totally break down, leaving Intertie capacity unloaded because Southwest buyers and Pacific Northwest sellers could not negotiate an acceptable price. BPA would reallocate the Intertie capacity if the Southwest purchaser could demonstrate that the Pacific Northwest seller's price was not

economical for that particular Southwest purchaser or any other potential Southwest purchaser.

BPA's initial proposal specified that the appropriate upper limit of a Southwest economical purchase price would be the price of the highest cost thermal resource that could be displaced. During the public comment forum, BPA indicated that it was considering including firm purchase contracts among the displaceable resources to determine the Southwest utility's highest economic price. (Griffin, BPA, TR 141.) However, at the time of the initial proposal and the public comment forums, BPA had not established a thorough description of the necessary information a Southwest utility would have to submit or the procedure to be used to evaluate the submittal. To establish these procedures BPA needs the cooperation of Southwest utilities and a thorough understanding of the decremental cost information that Southwest utilities could generate to reliably demonstrate the economic operation of their systems.

The discussion with Southwest utility representatives that ensued at the public comment forums demonstrated that the Southwest utilities' would not welcome the economic override provision. They viewed it as very complex to administer and highly intrusive on their internal operations and negotiating flexibility. (Pritchard, LADWP, TR 142-48; Fiske and Long, PG&E, TR 148-54.) The comments by Southwest representatives can be summarized in the words of one representative that "If you are doing this to protect the California parties, maybe we can do without such a gift." (Fiske, PG&E, TR 154.)

The consensus among Southwest and Pacific Northwest commenters is that the economic override

provision would be an unwarranted and unacceptable interference by BPA into the free market and therefore the provision should be eliminated. SCE believes that it is unclear as to who would benefit from the provision, and that the free market should be allowed to operate to resolve any price disputes. (Myers, SCE, letter dated 8/13/84, p. 2.) Portland General Electric (PGE) observes that the administrative oversight that would be required of BPA would be an unacceptable intrusion on Pacific Northwest utilities' marketing, and an effectively functioning market was more likely to occur without the provision. (Bredemeier, PGE, letter dated 8/13/84, p. 2.) WWP stated that the provision appears to be impractical. (Bryan, WWP, letter dated 8/13/84, p. 2.)

Western suggested that BPA defer to the Southwest utility's determination of its acceptable price and invoke the economic override provision to reallocate the unwilling seller's allocation. (Coleman, Western, letter dated 8/13/84, p. 5.) If the economic override provision were designed as Western suggests, without any requirement that the Southwest utility present objective evidence that the offered power is not economic for itself or any other Southwest utility to purchase, this would enable the Southwest purchaser to dictate any price it would choose. This would give the Southwest utilities an unacceptable ability to dictate price, by requiring the movement of allocations to utilities with "rock bottom" prices. This would allow Southwest utilities not only to negotiate with the utilities offering the best price, but also to completely remove any market force from sellers with higher prices. In fact, sellers originally with lower prices also would have no protection because Southwest utilities would force the removal of their Intertie access as well.

The PGP commented that they believed BPA should clarify that the economic price determination would be made by buyers and sellers, not BPA. (Garman, PGP, Letter dated 8/9/84, p. 4.) This comment indicates that the PGP favors eliminating the economic override provision.

Decision

BPA offered the economic override provision to prevent Intertie capacity from going unloaded in what BPA believes would be unusual circumstances. However, because of the procedural difficulties to implement the provision and the general consensus that the provision is ill-advised, BPA is not including an economic override provision in the initial 6-month Policy. The experience gained over the 6 months will provide evidence as to the need for such a provision. In addition, during this period BPA will continue to investigate potential procedures to implement the economic override provision, should it prove necessary.

G. Competition

Issue #1: Summary of Comments

A number of commenters expressed concern that the Near Term Intertie Access Policy is not consistent with the policies expressed in the antitrust laws. The thrust of many comments was that the allocation Policy has anticompetitive effects in several respect.

California utilities that own the southern portion of the Intertie commented that they believe the Policy impermissibly precludes competition and violates the policies of antitrust laws. (Myers, SCE, letter dated

8/13/84, pp. 8-9; Gardiner, PG&E, letter dated 8/13/84, p. 6; Cotton, LADWP, letter dated 8/13/84, pp. 3-4.) CPUC also viewed the Policy as restrictive of competition. (Fairchild, CPUC, letter dated 8/14/84, p. 2.) Western suggested BPA should participate on an equal basis with other Pacific Northwest utilities marketing power to the Southwest. (Coleman, WAPA, letter dated 8/13/84, p. 5.)

SCE argued that BPA's proposal was an attempt to avoid the natural effects of supply and demand on price by artificially limiting supply. (Myers, SCE, letter dated 8/13/84, p. 9.) PG&E commented that the Policy could reduce competition in two ways. First, the criteria for qualifying firm contracts for assured delivery limits the ability of Pacific Northwest and Southwest utilities to negotiate sales. Second, under the formula allocation procedures, once BPA or a Pacific Northwest utility has gained an allocation, that allocation cannot be increased by subsequent bargaining over price, so price competition for nonfirm sales will be eliminated. (Gardiner, PG&E, letter dated (8/13/84, p. 6.)

California utilities described three adverse consequences that allegedly will occur as a result of adopting the Near Term Intertie Access Policy. First, higher rates to California retail consumers; second, less power purchased from the Pacific Northwest and more from other suppliers; and third, adverse economic and environmental impacts resulting from increased thermal operation. (Myers, SCE, letter dated 8/13/84, p. 18; Gardiner, PG&E, letter dated 8/13/84, pp. 1, 6-8; Niggli, SDG&E, letter dated 8/13/84, p. 1.) S[D]G&E presented information showing that its resource mix was shifting to lower-cost resources and

that it had increased transmission capacity to lower-cost coal sources in Arizona. These comments were to imply that the Near Term Intertie Access Policy would result in increased reliance on power from these sources. (Niggli, SDG&E letter dated 8/13/84, p. 1.)

By comparison, California utilities that do not own an interest in the southern portion of the Intertie suggested that, while they believe the Policy promotes competition, it should go even further to support increased competitive access for other potential California buyers. (Brearley, Vernon, letter dated 8/9/84, p. 2.) Other California utility interests commented that the Policy could provide a positive step forward to rational, free market transactions between our regions. (Pugh, NCPPA, letter dated 8/13/84, p. 4; O'Banion, SMUD, letter dated 8/10/84, p. 6.) A California municipal utility noted that the argument likewise could be made that the practices of California utilities with Intertie capacity entitlements artificially limit demand and necessitate the provisions of this Policy to which the California utilities now object. (Brearley, Vernon, letter dated 8/9/84, p. 2.)

Evaluation of the Comments

The Near Term Intertie Access Policy allocates access in a way that may affect competition in several markets for Pacific Northwest power. The effect on competition is discussed more fully below and is based in part on BPA's testimony on market power in the 1983 section 7(k) hearing before FERC. This testimony is incorporated in the Administrator's Record. Because of the complexities of analyzing market effects, BPA responds to the above comments with a general

discussion of the markets affected by the Near Term Intertie Access Policy.

BPA is not subject to the antitrust laws because it is a Federal agency. However, because of the importance of the policies expressed by the antitrust laws, BPA believes it appropriate to consider the effects of the Near Term Intertie Access Policy on competition in markets potentially affected by the Near Term Intertie Access Policy.

Markets that may be affected by the Near Term Intertie Access Policy include, but are not necessarily limited to:

- (1) purchases of economy energy as it becomes available from Pacific Northwest and other sellers to displace higher cost energy otherwise available to the purchaser for periods generally ranging from 1 hour to a week or more (economy energy may be firm or nonfirm energy);
- (2) purchases of firm power or nonfirm energy on a guaranteed delivery basis from Pacific Northwest and other sellers to displace higher cost power otherwise available to the purchaser for periods ranging from a few hours to several months;
- (3) purchases of firm power from Pacific Northwest and other sellers to displace higher cost firm power available to the purchaser to meet future loads on a planning basis ranging from one to twenty years;
- (4) exchanges of power between utilities whereby power typically flows from one utility to the other at certain times, and in the opposite direction at other times so as to increase the efficiency with which each utility's generating resources are used; and

- (5) transactions consisting of a combination of these products.

While these markets can be defined more broadly, for example, by including Pacific Northwest purchasers of economy energy, the primary focus of this evaluation is on the markets for these products in California. This is not to say that other market areas are not affected. The Pacific Northwest market for economy energy may be affected during those times when the Near Term Intertie Access Policy results in higher prices. This is because Pacific Northwest buyers may have to compete against higher offers from California buyers than would otherwise be the case in the absence of the Near Term Intertie Access Policy. Similarly, economy energy sellers located in California and the Southwest may see changes in the prices offered for their products. It also is possible that a higher price for nonfirm, offered by California, would mean that some generating utilities in the Pacific Northwest would sell the nonfirm to California, instead of using it to displace purchases of firm from BPA. If less displacements were to occur, BPA might be able to offer to sell more guaranteed nonfirm energy, thereby increasing the overall supply of quasi-firm energy.

It is impossible to predict with precision the effect of the Near Term Intertie Access Policy on these markets. However, for the purpose of analyzing general tendencies, it is useful to compare the effect of the Near Term Intertie Access Policy on two of the primary markets that may be affected: (1) the economy energy market; and (2) the long term firm power market.

Presently, the supply of Pacific Northwest firm and nonfirm energy to meet the market for economy energy exceeds the capacity of the Intertie much of the time. Thus, the capacity of the Intertie restricts supply to Southwest buyers under these circumstances. For purposes of this discussion, this is assumed to be the case unless otherwise indicated in the text.

Discussion of the Long Term Firm Power Market

BPA, with few exceptions, has not provided firm access to the Intertie. This practice generally has precluded Pacific Northwest utilities from competing in the market for long term firm power sales. BPA cannot compete in this market because Pub. L. 88-552 effectively precludes export sales by BPA of firm capacity for longer than 5 years, and sales of energy for longer than 60 days.

The Near Term Intertie Access Policy creates a priority for transactions that require firm access to the Intertie. Thus, firm access is available to any Pacific Northwest utility to the extent that it has firm power on its system that is surplus to its needs on a planning basis and that it is able to sell on a firm basis to a the Southwest utility. The present Policy limits the priority for firm power to 2 years. Thus, the Near Term Intertie Access Policy does not create a priority with unlimited duration as BPA ultimately expects to do. The discussion that follows should be read with this in mind.

With respect to the market for long term firm power, the Near Term Intertie Access Policy enables Pacific Northwest utilities to compete in a market BPA

generally had not allowed them to compete in prior to adoption of the Near Term Intertie Access Policy. Adopting the Near Term Intertie Access Policy fosters competition in the long term firm power market because buyers have access to sellers who previously had been precluded from competing in this market by BPA's refusal to make firm Intertie transmission capacity available. If more potential sellers exist in a market, given a certain number of buyers, then that market can be described as more competitive.

Of course, providing firm access for sales of long term firm power reduces the Intertie space available for other transactions, such as sales of economy energy. This suggests that granting firm access would affect competition in the economy energy market by making economy energy more scarce, and thus more expensive. This is not the case here.

In a perfectly competitive market, higher prices will occur if supply is reduced and demand is constant. However, at least two aspects of the market for economy energy on the Intertie violate the assumptions of perfect competition. First, the Intertie itself is a physical constraint that restricts the quantity of energy that can be sold to an amount that is, in most circumstances, less than the market-clearing amount. Second, the amount of market demand for economy energy to be sold over the Intertie is restricted by the operating policies of the owners of the southern portion of the Intertie. Those owners do not allow other potential buyers in California to compete for Pacific Northwest economy energy and limit their competition with each other to their respective shares of the southern segment of the Intertie. Under these circumstances it is not possible to predict accurately

how a shift in supply or demand will affect the overall relationship between quantity offered and price received.

Further, any sale of long term firm power necessarily allocates capacity on the southern portion of the Intertie to the firm sale. This has the effect of reducing the demand for Pacific Northwest economy energy by an equivalent amount. That is, a long term firm power sale reduces both the demand for Pacific Northwest nonfirm energy and the amount of Intertie capacity available for nonfirm sales at the same time and thus in the same amount. In addition, there is a decline in the amount of economy energy (firm or nonfirm) available from Pacific Northwest utilities. These factors (supply, demand, and Intertie capacity) all will work together to define a new market for economy energy on the Intertie, and thus the resulting prices may be higher or lower than current prices. Finally, allocating a portion of the Intertie to long term firm power has an unknown effect on the market for economy energy because there is no competition among southern Intertie owners for economy energy beyond the individual search to fill their portions of the Intertie with the cheapest available Pacific Northwest energy. Southwest Intertie owners are more accurately described as a set of monopsonists, each with a separate transmission connection to the Pacific Northwest. Thus, there is already little if any competition on the buyers' side of the market for economy energy on the Intertie. The Near Term Intertie Access Policy cannot reduce that lack of competition further.

Allocating Intertie capacity to long term transactions facilitates the interplay of more participants on

both the demand and the supply sides of this market, thus facilitating competition more fully than did prior practices that limited access to sales only of economy energy. Under BPA's past practices, buyers preferring long term transactions with Pacific Northwest sellers were foreclosed from that market regardless of the price they were willing to pay for long term firm power. Sellers wishing such transactions were foreclosed regardless of how low a price they were willing to accept for such power.

Under the interim Policy, if buyers and sellers can agree on terms for long term transactions, and are willing to use a portion of available Intertie capacity for such transactions, then such transactions can occur. But unless such transactions occur, thus indicating buyer-seller preference for these transactions, Intertie capacity will remain available for economy energy transactions.

It is a truism that Intertie capacity used for long term transactions is unavailable for short term transactions. It is equally true that space used for short term transactions is unavailable for long term transactions. The interim Policy is designed to give market factors greater influence in determining how Intertie capacity is to be allocated between short term and long term transactions and to allow transactions to occur that were not possible before.

Description of the Economy Energy Market Prior to Adoption of the Policy

Economy energy is energy purchased on the spot market either to displace operation of higher cost resources on the purchaser's system, or to avoid the

cost of purchasing higher priced economy energy from other sellers. Pacific Northwest sellers may sell firm or nonfirm energy to serve the economy energy market. The value of economy energy can be measured by the decremental costs of the purchaser. Decremental costs are the costs that a purchaser can avoid by shutting down a resource it would otherwise operate or by avoiding a purchase of higher cost energy.

The economy energy market prior to adoption of the Near Term Intertie Access Policy was not a free and open market. Rather, it was a highly restricted, closed market. The southern portion of the Intertie is allocated into defined shares, primarily by ownership. Buyers of economy energy in California are divided into two groups: (1) utilities who own a portion of the southern segment of the Intertie (referred to below as "Owners") and (2) utilities who do not own a portion of the southern segment of the Intertie (referred to below as "Nonowners").

As noted above, the Owners deny Intertie access to the Nonowners. (See generally 26 FERC §65,178 - 65,233 (Feb 10, 1984) (Quad 7).) This exclusionary policy is applied even when the Nonowners may be willing to bid higher prices for Pacific Northwest economy energy than the Owners are offering to pay. This policy results in a less competitive market than would occur were the Owners to compete with the Nonowners of Pacific Northwest economy energy. This tends to reduce the price offered for Pacific Northwest economy energy below that which would result from a more competitive market.

The Owners do not compete with one another to purchase economy energy in quantities greater than those defined by their ownership shares of the Intertie.

Consider a simple situation in which there are only two owners, each with 50 megawatts of a 100-megawatt Intertie. Each owner knows that it cannot bargain with potential sellers in the Pacific Northwest for more than 50 megawatts because it does not have guaranteed access to more than 50 megawatts of transmission capacity. Competition between the two owners thus is effectively eliminated. This lack of competition tends to reduce the price of Pacific Northwest economy energy sold to California utilities compared to that which would occur in a more competitive market. That is, if the two owners had to bid not only for Pacific Northwest energy but also for transmission capacity (from, say, different utilities altogether), then each owner would know that bidding too low might result in gaining access to *no* energy and *no* transmission capacity, because the other owner, by bidding slightly higher, could succeed in buying enough energy for itself to fill the entire transmission capacity. This dynamic situation thus would lead to higher prices being offered by the Pacific Northwest utilities.

In short, while several commenters argued that a free, open, and competitive market is the most desirable way to allocate economy energy among buyers and sellers, the economy energy market has not operated in the past as a free, open, and competitive market. The Intertie access practices of the Owners yield them greater market power to affect prices for economy energy purchased from Pacific Northwest sellers than Pacific Northwest sellers, lacking allocated shares, usually possess.

In the past by offering lower prices, Pacific Northwest sellers, on the other hand, could capture a larger portion of the Intertie, except when the

Exportable Agreement was in effect, by offering prices lower than those of other sellers. Because Pacific Northwest sellers lacked guaranteed access to the Intertie, they were forced to lower prices in order to participate in the economy energy market. Just as buyers without guaranteed access would bid the price up in an attempt to bump other buyers out of the market, sellers without guaranteed access have actually bid the price down in an attempt to bump other sellers out of the market. Therefore, because some potential buyers are excluded from the market and because of limited competition among the Owners, prices resulting from competition among Pacific Northwest sellers tended to be driven downward in many instances below those that a more competitive market may have produced. This tendency occurred in part because the market power of sellers was less than the market power of the buyers in many instances.

Projection of the Economy Energy Market After Adoption of the Policy

The Near Term Intertie Access Policy changes the way transactions can occur on the northern portion of the Intertie to allow more balanced operation of the economy energy market. In a sense, the Near Term Intertie Access Policy divides the northern portion of the Intertie into ownership interests that may change hour-by-hour. Thus, on any given hour, buyers in California face Pacific Northwest sellers who are unable to compete with each other for an allocation on the Intertie greater than that which they receive under the Near Term Intertie Access Policy. However, because the ownership interests in the Pacific Northwest may change hourly based on cost and

availability conditions, there will still be more competition and flexibility on the northern portion of the Intertie than on the southern portion. Further, there will be more potential sellers on the northern portion than potential buyers on the southern portion, ensuring continued greater approximation to competitive market conditions on the northern portion.

The Near Term Intertie Access Policy increases the market power of Pacific Northwest sellers relative to that of California buyers. This effect tends to mitigate the previously existing imbalance in market power between the buyers and sellers. This may result in higher prices for economy energy purchased from Pacific Northwest sellers. However, the prices for economy energy after adoption of the Near Term Intertie Access Policy may more closely approximate those prices which would occur in a market where buyers and sellers have comparable market power.

The Near Term Intertie Access Policy consists of rules for allocating the northern portion of the Intertie under three conditions. These conditions and the general effects of the rules on competition are discussed for each condition in turn.

CONDITION 1

Condition 1 occurs when the existing supply of Pacific Northwest energy at applicable rates is greater than either the market demand or the available Intertie capacity, whichever is less. Under this condition, available Intertie capacity is allocated on a pro rata basis according to procedures specified in the Exportable Agreement, an existing contract between BPA and other Pacific Northwest sellers of energy. In

sum, BPA, in these conditions of excess supply, does not reserve the Intertie to itself in order to sell the maximum amount of its own energy, but rather grants access to other sellers on terms that assume that BPA itself will not be completely shut out. Under the Exportable Agreement the applicable rate as defined in the Exportable Agreement is the rate at which BPA offers to sell. This has been BPA's practice for 15 years.

For purposes of allocating Intertie capacity, BPA, at the request of California buyers, assumes that the demand for economy energy equals the capacity of the Intertie. BPA uses deviation accounting to cover instances when this assumption is not true.

The allocation occurs on a pro rata basis based on offers to sell at the applicable rate. Once an allocation is made, a utility is free to set any price it wishes for its allocation.

The Exportable Agreement provides for BPA to offer to purchase energy offered for sale by Pacific Northwest utilities that is not sold directly to California buyers. This energy is then resold to California buyers at the applicable rate. Thus, the applicable rate set by BPA tends to be the lowest price at which Pacific Northwest energy is sold to California buyers under the Exportable Agreement. BPA does not permit Pacific Northwest sellers to increase their allocation by lowering prices, although sellers are free to sell at any price they choose if they enter into direct sales to California utilities.

Pacific Northwest sellers of economy energy under Condition 1 must compete with a variety of other supply sources to which California buyers may turn. First, California buyers can operate their own

generating resources if the price of Pacific Northwest energy exceeds the incremental cost of such resources. Second, other utilities in California may offer to sell economy energy at prices lower than Pacific Northwest prices. Third, California utilities can import economy energy from regions other than the Pacific Northwest. These regions include Arizona, New Mexico, Nevada, Mexico, and Utah. Thus, while Pacific Northwest sellers do not compete under Condition 1 to sell at prices below the applicable rate, the price for Pacific Northwest economy energy tends to be a more competitive price under Condition 1 than were Pacific Northwest sellers the exclusive market suppliers.

The effects of the Exportable Agreement on the economy energy market have been a market norm for 15 years since the Exportable Agreement was executed. The degree to which these effects have affected the economy energy market over the years has changed with changing circumstances, including changes in the applicable rate.

CONDITION 2

Condition 2 exists when Condition 1 is not in effect and the aggregate of offers from BPA and Pacific Northwest utilities to sell energy at any price exceeds available Intertie capacity. Under this condition, the Intertie is allocated among Pacific Northerwest [sic] utilities on a pro rata basis similar to that in Condition 1. Extraregional utilities will not receive an allocation unless they agree to coordinate operation of their system with those of the Pacific Northwest so as to optimize the production of electric power as through [sic] these systems were operated by a single utility, or

to provide the Region with an appropriate benefit. Providing extraregional utilities with an allocation under Condition 2 probably would not substantially change the effects of the Policy on competition in the economy energy market. Allowing another seller with access limited to its allocation to participate in the market may make additional energy available at prices different from those offered by other sellers, but otherwise the market should function in much the same manner whether or not extraregional utilities are granted access under Condition 2.

Once a Pacific Northwest utility receives an allocation, it is free to negotiate the price with potential buyers. As in Condition 1, a seller can set any price it wishes for energy sold under its allocation. However, a utility will not be able to increase its allocation.

Once an allocation is made to a Pacific Northwest seller, it will have market power comparable to that of California Owners who do not face competition from the Nonowners or from the other Owners offering higher prices to obtain a portion of the Intertie greater than their ownership interest.

In contrast to the rules governing access to the southern portion of the Intertie which limit the number of buyers who may participate in the market for Pacific Northwest energy, the Policy permits any Pacific Northwest utility capable of scheduling energy to a buyer to participate in the market. Any Pacific Northwest utility capable of scheduling electric power to a California buyer may make a declaration to sell, and thereby receive an allocation. Other entities, such as PURPA resource sponsors, can sell economy energy through their local utility. Each Pacific Northwest seller (including BPA) runs the risk that its offer will

represent a small percentage of the total offers, resulting in a smaller hourly allocation. Thus, in circumstances where the demand for economy energy is high, many sellers are able to participate in the market should they choose to do so.

This situation may not always result in a reduction in price. However, this approach results in a sharing of the benefits of such transactions by a broad range of consumers. In instances where the demand for economy energy from the Pacific Northwest is less than the available Intertie capacity, the sellers will compete with one another to make sales up to their allocations.

Because of competition from other sellers located in California and other areas of the Southwest, the price for economy energy from the Pacific Northwest will reflect these competitive conditions. Because the Near Term Intertie Access Policy has the effect of making the market power of the sellers more comparable to that of the buyers, prices for economy energy purchased from Pacific Northwest sellers may tend to be somewhat higher than they would be were BPA to continue its past Intertie allocation practices. However, competition from sources outside the Pacific Northwest will continue to limit the prices received in the Pacific Northwest.

CONDITION 3

Condition 3 occurs when the offers to Pacific Northwest sellers are not sufficient to fill the available Intertie capacity. In this situation, each seller receives an allocation equal to its declaration. Each seller can sell as much as it wishes at any price it chooses--

provided it can find a willing buyer. The remaining capacity is available for use by extraregional sellers such as the British Columbia Hydro and Power Authority (B.C. Hydro). As in Conditions 1 and 2, a utility's allocation may not be enlarged. When market demand is insufficient to fill the Intertie capacity, competition will occur because Intertie access is not a market constraint. Competition among Pacific Northwest sellers and extraregional utilities to fill their respective allocations will occur as in Condition 2. In general the competitive effects of the Near Term Intertie Access Policy will be similar under Conditions 2 and 3.

Decision

BPA has assessed the impact the Near Term Intertie Access Policy may have on competition. In the same respects, the Near Term Intertie Access Policy will improve the functioning of the market for Pacific Northwest energy and enhance competition; notably, the Policy facilitates long term transactions that in the past had been foreclosed. In other respects, the Policy may alter some aspects of competition. Where this is so, California buyers have alternative sources that continue to limit the significance of changed competitive conditions. On balance, the Near Term Intertie Access Policy does not unreasonably restrict competition. Any potentially negative effects are not sufficient reason to forego the attainment of BPA's objectives in adopting the Near Term Intertie Access Policy.

III. Conditions for Access

A. Power Marketing Program

1. Relationship to Intertie Access Policy

Issue # 1: Summary of Comments

BPA's proposed Intertie Access Policy provided that BPA would allow access to the Intertie only for power from existing Pacific Northwest resources that would not create substantial interference with the Administrator's Power Marketing Program. (Draft Policy, section II.C.) The discussion of BPA's proposed Intertie Access Policy stated that the Power Marketing Program criteria is important to the Policy because it will help insure that BPA has access to a portion of its own Intertie on a continuing basis. (Draft Policy, section I.B.) PG&E noted the possible importance of the Power Marketing Criteria to the Intertie Access Policy. (Fiske, PG&E, TR 21.) PG&E wondered, however, whether the inclusion of the Power Marketing Program criteria would really make any difference to the implementation of the Policy. (Fiske, PG&E, TR 59-60.)

Evaluation of Comments

BPA's Intertie Access Policy proposed to allocate Intertie capacity controlled by BPA, a power marketing agency of the Department of Energy. BPA has defined the Power Marketing Program as the aggregate of the laws, contracts, and policy directives pursuant to which BPA conducts its business. It is reasonable for BPA to give notice that Intertie access

to Federal Intertie capacity will be granted only where such access does not substantially interfere with BPA's Power Marketing Program. Scheduling utilities and entities that request Intertie access need reasonable notice of BPA's intent to manage the Intertie consistent with such laws, contracts, and policies.

Decision

BPA has included the concept of the Power Marketing Program in its Intertie Access Policy. Requests for access will be measured against BPA's Power Marketing Program needs as defined by the Policy. The inclusion of the Power Marketing Program as an access standard gives notice of how BPA will share its ownership and contract rights. BPA believes it is important to give potential Intertie users notice of the terms which the Federal government will review when considering requests for access.

2. The Administrator's Power Marketing Program

Issue #1: Summary of Comments

BPA proposed to retain the authority to restrict access to the Intertie for any transaction if it determined that substantial interference with the Administrator's Power Marketing Program would result. Many comments were received on this issue. The comments both supported and opposed BPA exercise of such authority.

Those who supported BPA's use of the Power Marketing Program as a standard for access said that the standard is reasonable if it is synonymous with and

built on the foundation of the statutes, legislative history, contracts, and public statements, both permissive and restrictive, that affect BPA's marketing. (Schultz, ICP, letter dated 8/9/84, p. 5; Schultz, ICP, TR 10.) Other commenters also supported the general principle that the Near Term Intertie Access Policy should create no substantial interference with the Administrator's Power Marketing Program. (Wilcox, DSI, letter dated 8/13/84, p. 1; Canon, ICNU, letter dated 8/13/84, p. 1; McKinney, Cowlitz, letter dated 8/9/84, p. 1; Copp, *et al.*, Mid-Col. PUD's, letter dated 8/10/84, p. 1; Foleen, letter dated 8/10/84, p. 1; Boner, NP&P, letter dated 8/7/84, p. 1; Sanders, Clark, letter dated 8/10/84, p. 1; Maudlin, OPUC, letter dated 8/9/84, p. 1.; Brawley, PPC, letter dated 8/13/84, p. 1.)

While supporting the priority of the Power Marketing Program, one commenter said that BPA had not fully used its authority to condition access to the intertie on its Power Marketing Program and should allow sales of non-Federal energy only after BPA had disposed of its resources. (Wilcox, DSI, letter dated 8/13/84, p. 2.) This comment is discussed as Issue #4 in the Authority section of this Record of Decision. Another commenter also observed a relationship between the Power Marketing Program and BPA's revenue requirements, and argued that BPA should use the Intertie to maximize its own revenues and thereby keep the rates of its customers as low as possible. (Foleen, letter dated 8/10/84, p. 1; Foleen, TR 28, 68; Kemp, PG&E, TR 35-36.)

Other commenters felt equally strongly that BPA has no authority to condition Intertie access on a Power Marketing Program standard. (Bailey, PSP&L,

letter dated 8/13/84, pp. 1- 4; Myers, SCE, letter dated 8/13/84, p. 3; Gardiner, PG&E, letter dated 8/13/84, pp. 2-3.)

Several arguments were made by those who opposed BPA's utilization of the Power Marketing Program standard. California entities said that the standard was "broad and logically circular" and would grant the Administrator "unbounded discretion over Intertie access, well beyond that envisioned by statute." (Gardiner, PG&E, letter dated 8/10/84, p. 3.) LADWP agreed. (Cotton, LADWP, comments dated 8/13/84, p. 3.) PG&E asked whether there were any statutes which define the Power Marketing Program. (Fiske, PG&E, TR 70.) Western said that BPA's position went beyond reasonable limits. (Coleman, WAPA, letter dated 8/13/84, p. 2.) Finally, a Pacific Northwest private utility said that BPA's Power Marketing Program should be removed as a standard because BPA would gain an unfair advantage for Federal power. (Bailey, PSP&L, letter dated 8/13/84, p. 4.)

Evaluation of Comments

BPA believes that it has both express and implied authority to condition access to the Intertie on a showing that such access does not substantially interfere with the Administrator's Power Marketing Program.

BPA therefore agrees with the commenter who observed that Power Marketing Program was a reasonable condition of access to the extent that it was a short-hand reference for the totality of the statutes, legislative history, policies, and contracts pursuant to

which BPA conducts its power marketing role. (Schultz, ICP, letter dated 8/10/84, p. 5.)

BPA also carefully evaluated the position of those who opposed inclusion of the Power Marketing Program standard on the grounds that BPA had no authority to include such a standard in its policy.

Puget Sound Power and Light (PSP&L) argues that the Regional Preference Act (16 U.S.C. §837 *et seq.*) and the Northwest Power Act (16 U.S.C. §839 *et seq.*) do not provide authority to restrict access to the Intertie in order to avoid substantial interference with the Administrator's Power Marketing Program. (Bailey, PSP&L, letter dated 8/13/84, p. 2.) It argues that section 6 of the Regional Preference Act mandates access to capacity presumably in excess of that needed to transmit power under existing BPA power sales contracts. PSP&L also asserts that section 9 of the Northwest Power Act cannot be interpreted to allow restrictions on access in order to protect the Administrator's Power Marketing Program.

According to PSP&L, section 9(d) of the Northwest Power Act mandates non-Federal access to Intertie capacity subject only to the Administrator's contractual obligations, obligations under existing law and availability of transmission capacity. PSP&L stated that is [sic] only in section 9(i), which authorizes the Administrator upon request to provide additional services to his customers such as the acquisition of power for them or assistance in the disposal of their power, where substantial interference with the Administrator's Power Marketing Program is stated as a restriction on access.

Both PSP&L and Western argue that a sentence in the legislative history of the Regional Preference Act

prohibits the Administrator from refusing access to non-Federal entities in order to protect prospective BPA sales. (Coleman, WAPA, letter dated 8/13/84, p. 2.) CEC argues that BPA may not monopolize the Intertie for its own needs. (Imbrecht, CEC, letter dated 8/13/84, p. 3.) On the other hand, the Pacific Northwest Utilities Conference Committee (PNUCC) and the IPC assert that the transmission of non-Federal surplus power over the Intertie may be restricted if it would substantially interfere with the Administrator's Power Marketing Program. (Hardy, PNUCC, letter dated 8/13/84, pp. 8 and 33; Barclay, IPC, letter dated 8/13/84, p. 16.) PG&E also states that substantial interference with the Administrator's Power Marketing Program is sufficient justification for not granting transmission services, though it has reservations about BPA's interpretation of the phrase "Power Marketing Program." (Gardiner, PG&E, letter dated 3/16/84, p. 3.) The DSIs not only support the primacy of the Administrator's Power Marketing Program, but argue that the Administrator has no legal authority to provide Intertie access until sufficient Intertie access has been reserved to sell all of BPA's surplus. (Wilcox, DSI, letter dated 8/13/84.) The DSI argument is addressed below.

BPA is a power marketing agency of the United States Department of Energy, and the Secretary of Energy acts by and through the Bonneville Administrator. (16 U.S.C. §825s(a)(1)(D).) As a power marketing agency, BPA disposes of surplus Federal property. This property consists of both electric power and transmission services and disposal is made pursuant to the authority of the property clause of the United States Constitution and relevant statutes.

The generally accepted rule of law is that unless otherwise constrained, the power to dispose of surplus power is vested in Congress without limitation. Congress has delegated broad authority to dispose of surplus power to the Administrator. Relevant statutes include the Bonneville Project Act of 1937, the Flood Control Act of 1944, the Pacific Northwest Preference Act, the Federal Columbia River Transmission System Act, the Northwest Power Act, and the National Environmental Policy Act, among others. The statutes of power marketing agencies are to be interpreted *in pari materia*. (See *Disposition of Surplus Power Generated at Clark Hill Reservoir Project*, 41 Op. Att'y Gen. 236 (1955).)

These statutes include general directives such as the directive to set rates as low as possible consistent with sound business principles and to recover adequate revenue to repay the Federal investment in the BPA system. (16 U.S.C. §§832f, 838g, 839e(a)(1).) To achieve these and other purposes of the laws, Congress has authorized the Administrator "to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof, upon such terms and conditions and in such manner as he may deem necessary." (16 U.S.C. §832a(f).) This authority was recently reaffirmed in the Northwest Power Act. (16 U.S.C. §839(f)(a).)

Key among these authorities is the Congress' recognition that the Administrator shall make all arrangements for the sale and disposition of electric energy. (16 U.S.C. §832a(a).) In this capacity, the Administrator is authorized to operate electric transmission lines as he finds necessary, desirable, or appropriate for the purpose of transmitting electric

energy. (16 U.S.C. §832a(b).) Operation is to encourage the widest possible use of all electric energy, to provide reasonable outlets therefor, and to prevent the monopolization thereof by limited groups. (*Id.*) These and related standards have been interpreted as being susceptible of widely divergent interpretations and permitting the widest administrative discretion by the Secretary.

The Northwest Power Act and other laws, including section 6 of the Federal Columbia River Transmission System Act and section 6 of the Regional Preference Act, also recognize that BPA is authorized to make first use of its Intertie capacity in such a manner as the Administrator determines will satisfy the transmission requirements of the United States. (16 U.S.C. §§837e and 838d.) In section 9(i)(3) of the Northwest Power Act, it is expressly recognized, that:

The Administrator shall furnish services including transmission . . . *unless he determines such services cannot be furnished without substantial interference with his power marketing program, applicable operating limitations, or existing contractual obligations.*

(16 U.S.C. §839(f)(i)(3). emphasis added)

BPA has incorporated into the Near Term Intertie Access Policy its authority to protect its Power Marketing Program by denying Intertie access to transactions of non-Federal entities. BPA interprets relevant legislation as providing the authority for this action. The thrust of section 6 of the Regional Preference Act and its legislative history, section 6 of the Federal Columbia River Transmission System Act (16 U.S.C. §838 *et seq.*) and section 9 of the Northwest Power Act is that BPA shall determine its own needs

for priority use of the Intertie, and only thereafter make remaining capacity available to non-Federal entities.

The major theme running through the legislative history of the Regional Preference Act was the need for BPA to build Intertie capacity in amounts sufficient to assure BPA's access to the Southwest market for sales of BPA's surplus power. The Federal Task Force, which reviewed Intertie construction proposals from non-Federal entities, specifically recommended a plan of construction that would result in BPA controlling, by ownership and contract right, approximately 75 percent of the Intertie capacity. This figure approximated BPA's share of the regional surplus. (H.R. No. 590, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. Ad. News 3351.) (Dept. of Interior Rept., p. 26.) As then-Administrator Luce stated in testimony before the House Committee on Interior and Insular Affairs, BPA had to:

be assured of its fair share of the capacity of any proposed plants [i.e. Intertie facilities], inasmuch as we have three-fourths or more of the surplus power in the Northwest. We, of course, want to be sure that we have at least three-fourths or more capacity of any plants for interconnection with California. Otherwise, we might be frozen out of markets that we think are rightfully ours.

(Hearings on S.1007, H.R. 994, H.R. 1160, H.R. 4071, and H.R. 4485 before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, 88th Cong., 1st Sess. 152 (1963).)

Interior Secretary Udall, in testimony before the same Subcommittee, made the following statement in response to a question:

“MR. HOSMER: Why should you and the public taxpayers build those lines when somebody else is willing to put up their own money to build them?

“Secretary UDALL: Well, Congressman, the answer I think, the whole answer is with regard to how the power should be marketed and who controls the marketing of power

“MR. HOSMER: You want the power of control - - -

“Secretary UDALL: (continuing) A piece at a time.

“MR. HOSMER: You want the power of control in the Department of Interior, do you not?

“Secretary UDALL: This is a power that has been in the Interior Department”

(*Id.* at 120.)

The Regional Preference Act provides clear authority to the Administrator to use the Federally owned Intertie capacity on a priority basis for the transmission of Federal power. Section 6 states that capacity in excess of that “required for the transmission of Federal energy [and also Canadian Treaty energy] shall be made available as a carrier for transmission of other electric energy.” To clarify that this priority for Federal power does not pertain only to existing BPA power sales contracts but also to potential future BPA transactions, both the House and Senate reports

specifically state that the Administrator may take into account "Federal needs reasonably foreseeable" in determining the amount of excess Intertie capacity available for use by non-Federal entities. (H. Rep. No. 590, 88th Cong., 1st Sess. 9 (1963); S. Rep. No. 122, 88th Cong., 1st Sess. 12 (1963).)

As authority for their argument that the Administrator may not restrict access to protect his Power Marketing Program, Western, PSP&L, and PG&E cite the phrase immediately following the above-cited statement: "[T]he Secretary may not decline to enter into a wheeling agreement merely because he may have energy available for sale to serve the same load." (*Id.*) Given the numerous legislative history references to the Intertie's primary goal of transmitting Federal power and the above-cited statement concerning the Administrator's authority to protect "Federal needs reasonably foreseeable", this statement can only be construed as prohibiting BPA from restricting Intertie access for a non-Federal transaction merely to reserve that capacity for a potential BPA sale to the same buyer involved in the restricted non-Federal transaction with energy the Administrator cannot assume will be available on a planning basis. If Congress had wanted to require the Administrator to compete with other Pacific Northwest sellers for sales in order to gain access to the Federal Intertie, it would at least have used the words "merely because he *has* energy available for sale to serve the same load." The use of the words "*may* have energy available for sale" are to be read in conjunction with the prospective planning authority granted in the previous phrase. They were intended to restrict the horizon of that authority.

The phrase cited by PSP&L and Western, at most, speaks to a struggle between BPA and a non-Federal entity for a surplus sale to the same Southwest entity. The words cannot be stretched to prohibit appropriate planning of Intertie use in order to serve "Federal needs reasonable foreseeable," particularly if those needs do not specifically involve the Southwest buyer involved in the non-Federal transaction that is being restricted. Indeed, the explicit sanction given in the legislative history to planning for "Federal needs reasonably foreseeable" directly contradicts PSP&L's, Western's and PG&E's assertions. However, it should be noted that the Administrator's Policy does *not* state that BPA would necessarily restrict access to the Intertie for a transaction between a Pacific Northwest entity and a Southwest buyer merely because BPA desires to make a surplus sale to the same Southwest buyer.

The Western, PSP&L, and PG&E argument also violates the fundamental rule of statutory construction that statutes should not be read to produce absurd results. It is wholly inconsistent with law and logic to argue that Congress would handicap the Administrator's ability to recover the large Federal investment in the Intertie and other components of the Federal Columbia River Power System by precluding him from priority use of the Federally owned Intertie.

The Northwest Power Act did not restrict the authority to manage the Intertie in order to protect the Administrator's existing and reasonably projected transactions with Southwest entities. Section 2 of the Northwest Power Act specifically states that the Act is intended to be construed in a manner consistent with the provisions of other laws applicable to the Federal

Columbia River Power System. The legislative history of section 9(i) makes explicit reference to protecting the Administrator's Power Marketing Program while providing transmission services to non-Federal entities, stating that it "essentially ratifies BPA's existing policies on services." (H. Rep. No. 96-976, Part II, 96th Cong., 1st Sess. 56 (1980).) PSP&L therefore attempts to make a substantive distinction between the intent of section 9(i) and section 9(d), which also addresses transmission services for non-Federal entities but does not explicitly reference the primacy of the Administrator's Power Marketing Program. PSP&L argues that section 9(d) was intended to address Intertie transmission services to non-Federal entities while section 9(i) only addresses "additional services" that BPA provides to its customers to assist them in the sale of their own power. Therefore, it argues, since section 9(d) does not reference the primacy of the Administrator's Power Marketing Program, the Administrator may not manage the Intertie so as to protect that program, and the multibillion dollar Federal investment in the Federal Columbia River Power System.

No such distinction can stand scrutiny. Congress saw fit to address transmission services for non-Federal entities in two separate subsections of section 9. Both speak of providing transmission services to the Administrator's customers. Section 9(i)(3) indicates no intent that it be limited to transmission of resources that the Administrator is requested to attempt to sell for the owner. Further, PSP&L has not provided any rationale to explain why Congress, in defining BPA's Intertie management authorities, would distinguish between the Intertie transmission rights of utilities that sell their own power to California and utilities that request BPA to make the sales.

Section 9(d) likely was intended to be a reassertion of section 9(i), since the latter had been included in earlier versions of this section while the former had not. (H. Rep. No. 96-976, Part I, 96th Cong., 2d Sess. 20 (1980).) Section 9(d) explicitly incorporates the provisions of section 9(i). It is not intended to provide a substantively different transmission mandate. Indeed, as PSP&L's comment shows, the legislative history of section 9(d) explicitly references the priority granted to the transmission of Federal power. Without a clear Congressional statement that section 9(d) was intended to restrict the broad authority previously granted in the Regional Preference Act to take into account "Federal needs reasonably foreseeable," it must be assumed that Congress was referring to the entirety of the previously granted authority.

Several commenters asked whether the BPA was aware of any reference to Power Marketing Program other than that contained in section 9(i)(3). The answer is yes. The concept of the Power Marketing Program is implicitly recognized in the Department of Energy (DOE) Organization Act. The DOE Organization Act requires that the Secretary appoint an Assistant Secretary who shall have responsibility for "(10) *Power marketing functions*, including responsibility for marketing and transmission of Federal power." (42 U.S.C. §7133(a)(10).) The legislative history of the DOE Organization Act characterizes the BPA as a "power marketing agency" responsible for acting as the "power marketing agent" for electrical generation and, in that capacity, "owning and operating the largest high-voltage transmission system in the free world" (S. Rep. No. 164, 95th Cong., 1st Sess. 30 (1977) U.S. Code Cong. and Ad. News 884.)

In short, the words “power marketing function” and “power marketing agent” as used in the DOE Organization Act represent, when read in connection with the “power marketing program” language of the Northwest Power Act, a congressional recognition of BPA’s power marketing role. As a “power marketing agent” BPA has a “power marketing function” that is the subject of a “power marketing program.” The concept of the “power marketing program” is also found in the Code of Federal Regulations (CFR) pertaining to Parks, Forests, and Public Property. Applications for the construction of electric transmission lines across Federal land must be prepared in such a way as to avoid conflict with the “power marketing program of the United States.” (36 CFR §§14.76 and 251.54.)

The objection was raised that if BPA defines Power Marketing Program in a “broad and logically circular” manner it would grant the Administrator “unbounded discretion over Intertie access, well beyond that envisioned by statute.” (Gardiner, PG&E, letter dated 8/10/84, p. 3.) LADWP submitted that BPA’s proposed policy “vests in the Administrator discretion to determine unilaterally what uses shall be made of the Intertie, as what time, and by whom.” (Cotton, LADWP, letter dated 8/13/84, p. 3.)

BPA recognizes that the statutes and authorities pursuant to which it conducts business afford it broad discretion in disposing of Federal property. BPA believes that Congress granted it this broad authority because of the need for BPA in disposing of Federal property to “operate in a businesslike fashion . . . free . . . from the requirements and restrictions ordinarily applicable to the conduct of Government business.” (S.

Rep. No. 164, *supra* Report of the Senate Energy and Natural Resources Committee at 30.) The decision that BPA has such broad authority has been judicially affirmed in several forums, including the United States Supreme Court. The Comptroller General has concurred. BPA's Policy attempts to reasonably balance its authorities in an equitable manner. The 6 month term of the Policy will allow BPA to determine whether equity is being achieved.

Decision

BPA's final Policy retains the concept of providing access to existing resources consistent with BPA's Power Marketing Program.

Issue #2: Summary of Comments

BPA's proposed Policy included eight criteria as elements of the Power Marketing Program for the purposes of the Policy. (Near Term Intertie Access Policy, section 3(a)-(h).) PG&E asked whether this was an exhaustive list. (Fiske, PG&E, TR 62.) The same commenter wondered whether the specific elements of the Power Marketing Program had appeared elsewhere before preparation of the draft Intertie Access Policy or whether this definition was put together just for the purpose of the Policy. (Fiske, PG&E, TR 69.) PG&E also asked whether there was a statutory basis for items (a), (b), and (c) of the criteria listed in the draft Policy. (Fiske, PG&E, TR 63.)

Generally, those entities which believed BPA lacked authority to condition Intertie Access on the Power Marketing Program standard also believed that BPA's definition of Power Marketing Program was so broad

as to lack meaning. (Bailey, PSP&L, letter dated 8/13/84, p. 1; Gardiner, PG&E, letter dated 8/10/84, p. 3; Coleman, WAPA, letter dated 8/13/84, p. 2; Schultz, ICP, letter dated 8/10/84, p. 5.) Others stated that the BPA Power Marketing Program needs to be defined. (Schultz, ICP, TR 20; Fiske, PG&E, TR 20; Budhraj, SCE, TR 55; Parks, EWEB, letter dated 8/10/84, p. 1.) PG&E submitted that BPA had yet to provide adequate definitions of both "power marketing program" and "substantial interference." (Gardiner, PG&E, letter dated 8/10/84, p. 3.) Western suggested that BPA's standards would permit BPA to act arbitrarily. (Coleman, WAPA, letter dated 8/10/84, p. 2.)

Evaluation of Comments

As noted above, the statutes of Federal power marketing agencies, including BPA, are to be read *in pari materia*. While the term "Power Marketing Program" appears in one specific statutory provision, it is but a shorthand reference to all of BPA's laws and policies. These laws and policies vest BPA with broad discretion to make decisions with respect to the conditions under which entities will be given access to the Federally owned intertie. This discretion would exist independent of any specific statutory provision, and BPA actions are to be judged on a case-by-case basis as applied to specific decisions to deny or allow access. To the extent that the definition is broad, it is broad by virtue of Congress' election to permit latitude in making decisions about the disposal of surplus Federal property. Reserving the authority to allow access consistent with the agency's laws and policies under the general rubric of "Power Marketing

Program” is not, however, overly broad. Whether specific decisions are supported is a question that arises with the application of the policy, and not independent of it.

If a party disagrees with BPA’s decision to deny access, it may seek judicial relief. Normally, due process requirements require BPA to notify the party seeking access of its decision and the reasons for the denial. However, there is no legal requirement that BPA describe in the Policy with absolute certainty what interferes with its Power Marketing Program and what does not. It is well established that agencies can implement policy by rule or on a case-by-case basis.

Decision

Rather than try to list the elements of the Power Marketing Program, BPA has elected to define the Power Marketing Program as the “aggregate of BPA’s power marketing actions taken and policies developed to fulfill BPA’s statutory obligations and policy directives.” BPA will measure each request for assured delivery or allocation of Intertie Capacity against these laws and policies and determine whether the request will not substantially interfere with the Power Marketing Program.

Issue #3: Summary of Comments

One commenter raised an important issue regarding ongoing review of access to assure compliance with BPA’s Power Marketing Program. The commenter said that BPA should define conditions for Intertie access temporally, and having once determined to grant access should honor contracts signed after such

determination. (Coleman, WAPA, letter dated 8/10/84, p. 3.) A second commenter also stressed the need for certainty in Intertie access. (Boucher, PP&L, letter dated 8/13/84, p. 2.) Another questioned whether BPA believed that the concept of Power Marketing Program allowed BPA to change the policy midstream. (Williams, SCE, TR 31.)

Evaluation of Comments

Western questioned the lack of “a stated temporal limit to the application of this test, i.e., the test for significant interference with the Power Marketing Plan” (Coleman, WAPA, letter dated 8/10/84, p. 3.) Western suggested that “if a contract was originally granted firm Intertie access based on its compliance with the C.2. conditions [of the draft Policy] and the ‘true firm’ contract test, it still would have no assurance of continued Intertie Access.” (*Id.* at 3.) PP&L urged BPA “to clarify that firm and nonfirm Intertie allocations and methodologies will not be subservient to future determinations of Bonneville’s Power Marketing Program. The absence of such assurance will preclude or inhibit the Northwest utilities’ negotiations for firm contracts.” (Boucher, PP&L, letter dated 8/13/84, p. 2.) The third commenter was concerned that BPA not “exercise a veto and modify the policy mid-stream” by reliance on the concept of Power Marketing Program. (Williams, SCE, TR 31.)

These comments are well taken. BPA desires to provide as much certainty as possible with respect to Intertie transactions. BPA agrees that to the extent certainty is achieved in commercial transactions, a better business climate is created. This is as true with

respect to the sale of power and transmission services as it is with respect to the sale of other goods and services. At the same time, it is unlikely that BPA would approve a request for Intertie access if it knew that during the term of the contract the party with whom it had contracted would operate the resource in such a way as to substantially interfere with BPA's Power Marketing Program or the other criteria of C.3 of the Near Term Intertie Access Policy as adopted. This does not mean, however, that BPA will amend the policy without appropriate procedure. (Jones, BPA, TR 31.) If BPA agrees to provide assured delivery to a utility under agreed upon conditions, BPA will not subsequently recall that assured delivery if the utility meets those conditions even if BPA changes its Power Marketing Program or its Policy.

Decision

Once BPA signs a contract for Intertie access there will be an assurance of continued delivery subject to the terms of the contract or arrangements agreed to when access is initially granted. The terms of service for assured delivery have been clarified in the Policy to permit schedules to be arranged with certainty. Assured delivery has been added as a defined term to clarify that the service provided is firm in the sense that it is not interruptible except for *force majeure* even if BPA changes its Power Marketing Program or its Intertie Policy. Changes to the policy will be made by following appropriate procedure.

Issue #4: Summary of Comments

Under the proposed policy, BPA would have Intertie access for its existing contracts, new firm contracts which meet the criteria for assured delivery, and allocated shares of capacity under the Exportable Agreement, as in the past, and under Conditions 2 and 3.

Several commenters asked about the relationship of the Power Marketing Program and the Formula Sharing Method. Generally, these commenters questioned whether the Power Marketing Program could supercede, override, or limit the formula for allocations. (Fiske, PG&E, TR 24; Long, PG&E, TR 27, 42-43, 61; Budhraj, SCE, TR 52.)

Evaluation of Comments

The commenters seek certainty. The basic question is whether the Policy applies the Power Marketing Program standard in the same manner to assured delivery and to formula allocation requests. The comments were well taken. The operative provisions of the draft Policy did not adequately specify how the test of substantial interference with the Power Marketing Program would be made. It was not clear if the capacity available for formula allocation was subject to the Power Marketing Program needs, or if an hourly allocation might be interrupted without notice.

BPA responded to questions regarding this matter at the public comment meetings. BPA staff said that there was nothing in the policy that would provide for superceding a nonfirm allocation once made. (Jones, BPA, TR 53.)

Decision

The Policy clarifies the application of the Power Marketing Program standard to formula allocations. Language has been added to reflect the fact that BPA will determine the capacity available for formula allocation with reference to the BPA Power Marketing Program, as well as operating limitations, existing contracts, and other specified conditions for access. The needs of assured delivery contracts will be subtracted before determining the access that remains for formula allocation. In the event that BPA must make use of the Intertie capacity or a portion of it to serve the conditions of section C of the Policy, this will decrease the amount of capacity available for formula allocation. However, BPA will not interrupt schedules made pursuant to the formula allocation methodology for Power Marketing Program purposes or other section C conditions.

3. Relationship of Power Marketing Program, Intertie Access and Other BPA Obligations

Issue #1: Summary of Comments

A number of comments were made regarding the relationship between BPA's Intertie access, its revenue needs, and the Power Marketing Program.

The PNGC asked whether the BPA Power Marketing Program was satisfied if transactions that otherwise met the criteria for firm power sales were found to adversely affect BPA revenues, including nonfirm revenues. (Nadal, PNGC, TR 39.) Western stated that BPA's Power Marketing Program should

not be allowed to permit BPA to make nonfirm sales while denying firm access to others. (Coleman, WAPA, letter dated 8/10/84, p. 4.) Western also observed that BPA should limit application of the Power Marketing Program to those contracts or actions necessary to meet the needs of its firm requirements and should not preclude access on any other basis, including allowing its nonfirm sales to be made in lieu of granting firm power contracts access. (Coleman, WAPA, letter dated 8/10/84, p. 2.) The Oregon Public Utilities Commissioner (OPUC) also asked whether BPA's intent was to refuse access to others to preserve sales of BPA nonfirm energy. (Maudlin, OPUC, letter dated 8/9/84, p. 2.)

PG&E asked whether the BPA Power Marketing Program was satisfied if BPA can market its pro rata share of surplus as set forth in the allocation formulae. (Long, PG&E, TR 30; Jones, BPA, TR 30.) SCE asked if the Power Marketing Program would be violated if other Intertie users sell at rates lower than BPA (Moran, SCE, TR 24; Jones, BPA, TR 24, 25.)

At least two commenters said that BPA's Intertie Access Policy should not adversely affect BPA revenues needed to repay the Federal investment and keep rates to customers as low as possible consistent with sound business principles. (Foleen, TR 28; Jones, BPA, TR 28-29; Kemp, PG&E, TR 36; Jones, BPA, TR 36; Foleen, TR 68; Jones, BPA, TR 68; Foleen, letter dated 8/10/84; Dotten, DSI, TR 322-323.) The DSIs stated that BPA should only provide Intertie access to others to the extent the Intertie "is not required for the transmission of federal energy" (Wilcox, DSI, letter dated 8/13/84, p. 1.)

Evaluation of Comments

BPA's explanation of the major provisions of its draft policy stated with respect to this issue that "The proposed policy will insure that BPA has access to a [sic] portions of its own Intertie capacity on a continuing basis." (Draft policy, section I.B.1.) BPA added that, "If BPA can have a reasonable expectation of selling its firm surplus and nonfirm energy for established cost-based rates, its power marketing program will experience minimal interference." (*Id.*)

Commenters were concerned that BPA's need to meet its own revenue requirements would be used as a basis to deny access. Their logic was that unless BPA revenue requirements are met, allowing access to others would substantially interfere with the Power Marketing Program. Many felt that the interests of others in Intertie access should be treated equally with that of BPA. This tends to overlook BPA's need to recover revenues that are adequate to repay the Federal investment in the BPA system within a reasonable period of years. (16 U.S.C. §§839g and 839e(a)(1).) This is an obligation that has recently been of particular interest to Congress and the General Accounting Office. It also is an obligation that affects BPA's ability to set the lowest possible rates consistent with sound business principles. (16 U.S.C. §§839g and 839e(a)(1).)

BPA stated that the Policy was not intended to be used to deny assured delivery on the basis that providing for firm transactions could adversely affect BPA nonfirm sales. (Jones, BPA, TR 29.) However, it was emphasized that predicting the financial impacts on BPA of individual transactions could not be done

independent of review of the individual transaction, and that BPA could not rule out circumstances where proposed firm transactions might have such an impact on BPA's revenue requirement as to substantially interfere with the Power Marketing Program. BPA also indicated that the Policy presumes that if BPA had a pro rata share of the Intertie and could market its surplus on that share, BPA revenue requirements would be satisfied. (Jones, BPA, TR 29.)

Decision

BPA's ability to meet its revenue needs remains an integral part of the Power Marketing Program.

4. The Relationship Between Substantial Interference With the Power Marketing Program and Significant Adverse Impact on the Power Marketing Program

Issue #1: Summary of Comments

One commenter noted that in the background discussion on the proposed Policy, BPA had in one instance described as a condition of access no "substantial interference with BPA's Power Marketing Program" and in another instance spoken of "significant adverse impact on BPA's power marketing program." (Foleen, TR 28-29.)

Evaluation of Comments

The comment was well taken. BPA staff stated at the public comment meeting that the two phrases "substantial interference" and "significant adverse

impact" were intended to be synonymous. (Jones, BPA, TR 28.) Occasionally, discrepancies between language prefatory to the policy, other statements regarding the policy, and the policy itself will occur. BPA's final policy has sought to correct all such discrepancies. However, in all instances the policy controls.

Decision

The discrepancy has been corrected. The final Policy provides that requests for available Intertie capacity will be reviewed to assure that such requests do not "... substantially interfere with the Administrator's Power Marketing Program." (Final Policy, section C.3.a.(1).) The defined term, "substantially interfere" also applies to BPA's Power Marketing Program.

5. Power Marketing Program and 9(i)(3) Resources

Issue #1: Summary of Comments

One commenter asked for clarification that resources meeting the criteria of section 9(i)(3) of the Northwest Power Act would be considered as resources consistent with the Administrator's Power Marketing Program. (Dyer, PG&E, TR 64.)

Evaluation of Comments

The transmission priority referred to at the Public Comment Forum is a priority for services to be given to selected resources: those under construction on the effective date of the Northwest Power Act if the

capability of such resources is offered to BPA for sale at cost, plus a reasonable rate of return, pursuant to the Northwest Power Act and the offer is not accepted within 1 year. (16 U.S.C. §839f(i)(3).)

Decision

To the extent that section 9(i)(3) priority resources are identified by the Administrator, those resources will have the priority identified by statute. To date BPA has identified no such resources.

6. BPA's Reservation of Capacity

Issue #1: Summary of Comments

As indicated earlier in the Record of Decision, the DSI's said that BPA was mandated to reserve sufficient capacity on the Intertie to sell its surplus.

Evaluation of Comments

While BPA concluded that the Administrator was not mandated to reserve that amount of capacity, and BPA elected to accept a limitation on the account of capacity to be used for assured deliveries and to partake in Condition 2 allocations on the same terms and conditions as other scheduling utilities, BPA agrees that it may from time-to-time have need of Intertie capacity to meet other Federal obligations.

Decision

BPA will provide assured delivery or allocate Intertie capacity to BPA and scheduling utilities,

subject to reserving Intertie capacity otherwise required by the Administrator to support his Power Marketing Program.

B. Federal System Operating Limitations

1. Operating Conditions and Prevention of Monopolization by Limited Groups

Issue #1: Summary of Comments

Two commenters inquired regarding the draft policy language respecting operating conditions and how BPA viewed the interrelationship between operating conditions and monopolization of transmission facilities by limited groups. (Schultz, PG&E, TR 74, 76; Pritchard, LADWP, TR 77.)

Evaluation of Comments

The commenters wanted to know how the Intertie Access Policy prevents monopolization by limited groups. (Long, PG&E, TR 74-75) BPA staff observed at the public comment forums that this was accomplished by providing an equitable basis for BPA's sharing of its ownership or contract interest in Intertie capacity. (Jones, BPA, TR 76-77.) Referencing statutory provisions such as the prevention of monopolization by limited groups is unnecessary. They have been removed from the Policy.

Decision

BPA's final policy limits operating conditions to those conditions which truly affect day-to-day opera-

tional practices. (Final Policy, section C.4.(a)(e)). Statutory marketing directives such as the directive to operate the transmission system in such a way as to encourage the widest possible use, provide reasonable outlets, and prevent monopolization have been deleted. While these and other statutory provisions and policies guide the Administrator in allocating Intertie capacity, the interpretation of statutes is a matter of law and not an operating limitation.

2. BPA Operating Criteria and Standards and the Western States Coordinating Council Minimum Operating Reliability Criteria

Issue #1: Summary of Comments

One commenter wanted to know whether BPA met the criteria of the Western States Coordinating Council. (Foleen, TR 79.)

Evaluation of Comments

BPA staff stated that he believed BPA met the Western States Coordinating Council (WSCC) criteria. (Jones, BPA, TR 79.)

Decision

BPA meets the WSCC standards. The criteria remains in the final Policy.

C. Existing Contractual Obligations

1. Interference With Existing Contractual Obligations

Issue No. 1: Summary of Comments

Some commenters believe that BPA's actions under the proposed Near Term Intertie Access Policy impair performance of existing contracts, alter existing business arrangements and constitute intentional interference with contracts between California utilities and Pacific Northwest entities. (Myers, SCE, letter dated 8/13/84, pp. 18-19; Gardiner, PG&E, letter dated 8/10/84, p. 7; Cotton, LADWP, letter dated 8/13/84, p. 4; Imbrecht, CEC, letter dated 8/13/84, p. 5.) Some commenters claim interference with or fear constraint of contractual relations with Canadian utilities. (Cotton, LADWP, letter dated 8/13/84, p. 4; Gardiner, PG&E, letter dated 8/10/84, p. 7.)

SCE believes that under the proposed Policy BPA is given unnecessary discretion to determine access to the Intertie because the criteria conditioning access are not reasonably predictable. (Myers, SCE, letter dated 8/13/84, p. 18.) PG&E believes that if Pacific Northwest utilities do not have a sufficient allocation on the Intertie, PG&E will not be able to realize a full benefit under its contracts. (Gardiner, PG&E, letter dated 8/10/84, p. 7.) LADWP considers the proposed Policy a breach of its Exchange Agreement with BPA, as well as a breach of existing contracts between BPA and affected utilities. (Cotton, LADWP, letter dated 8/13/84, p. 4.) LADWP also considers the Policy an intentional interference with the contractual arrangements between utilities, such as LADWP, and other

Pacific Northwest and Canadian utilities. (*Id.*) CEC believes that the proposed Policy “raises suspicions and concerns that California will not receive fair treatment in negotiating firm contracts and transmission capacity expansions.” (Imbrecht, CEC, letter dated 8/13/84, p. 5.)

Evaluation of Comments

The Near Term Intertie Access Policy allocates BPA's portion of the Intertie pursuant to statutory mandate. (16 U.S.C. §§837, 838, 839.) The Policy provides that in allocating capacity on the Intertie, BPA will not act in conflict with BPA's existing contractual obligations. (Final Policy, section II.C.3.b(1).) SCE recognizes that BPA will provide assured access pursuant to existing contractual obligations. (Myers, SCE, letter dated 8/13/84, p. 19.) PG&E's concern with respect to not obtaining the “full benefit” of a contract if a Pacific Northwest utility is not given a sufficient allocation on the Intertie is not warranted. BPA believes that sales to the Southwest have always been conditioned on the ability to transmit the power. Furthermore, BPA has stated in the Intertie Access Policy that it intends to respect all of the terms and conditions of its own contracts. There may be contracts in existence to which BPA is not a party that purport to rely on BPA transmission for fulfillment of the contracts.

LADWP charges that BPA is interfering with LADWP's contracts with Canadian suppliers. (Cotton, LADWP, letter dated 8/13/84, p. 4.) BPA is aware that during the development of the Near Term Intertie Access Policy, LADWP negotiated and executed an energy sales agreement with B.C. Hydro. When BPA

first became aware of the potential for such an agreement, BPA informed LADWP of BPA's concern that the transaction would of necessity utilize Federal facilities and requested information. (Johnson, BPA, Mailgram dated 11/3/83.) On November 18, 1983, BPA again warned LADWP, in response to a November 10, 1983, letter, that:

"We want to make it clear that there is no firm transmission path for amounts of power between B.C. Hydro and LADWP. Further, the agreement as stated appears to assume that very large but unspecified amounts of Federal transmission will be available on a non-firm basis. Availability of such excess capacity will be affected by intertie access policy and other considerations."

That letter also reminded LADWP that BPA had announced its intent to develop an Intertie Access Policy by FEDERAL REGISTER notice on July 22, 1983. (Johnson, BPA, letter dated 11/18/83.) Again, on January 25, 1984, BPA warned LADWP that no significant discussions had taken place between LADWP, BPA, and B.C. Hydro and that BPA was concerned about expectations of LADWP and B.C. Hydro regarding the availability of BPA-owned transmission, including the Intertie. The letter also reminded LADWP that neither LADWP nor B.C. Hydro had requested transmission services from BPA. LADWP was informed again that BPA was developing an Intertie Access Policy. (Jones, BPA, letter dated 1/25/84.)

Despite repeated reminders by BPA that it could not assure firm or nonfirm transmission after the completion of the Intertie Access Policy, LADWP and

B.C. Hydro entered into a contract on January 26, 1984, without a transmission agreement with BPA. It is BPA's position that to the extent that LADWP was aware of the development of and was involved in the comment on this Policy, LADWP cannot claim that BPA is intentionally interfering with a LADWP - B.C. Hydro contract.

LADWP and B.C. Hydro lack the authority to enter into an agreement that dictates how BPA, as an agency of the Federal government, may or may not allocate space on the Intertie. It is BPA's Intertie Access Policy that determines access rights to the Intertie, not any contract to which BPA is not a party. As the parties to these agreements well know, it has been a longstanding BPA policy not to provide firm access to the Intertie. For these parties now to suggest that somehow they have entered into contracts conferring on themselves an exemption to BPA's Intertie Access Policy, without BPA's consent, is absurd.

Furthermore, implementation of the LADWP - B.C. Hydro contract is specifically conditioned on BPA providing transmission service between the Canada-USA border and the Nevada-Oregon border. (B.C. Hydro-Los Angeles Energy Sales Agreement Between British Columbia Hydro and Power Authority and Department of Water and Power of the City of Los Angeles, DWP No. 10103, Art. 5.1.4, dated 1/26/84, p. 4.) Thus, the contractual rights of the parties are expressly conditioned on BPA's transmission policies including the Intertie Access Policy. Any claim by LADWP that BPA is interfering with this contract, in adopting the Intertie Access Policy, is without merit. BPA recognizes that LADWP disputes BPA's interpre-

tation of the LADWP - B.C. Hydro agreement. That dispute is presently the subject of litigation.

BPA believes that claims against it for interference with existing contracts are without merit. As stated above, sales between the Pacific Northwest and the Southwest historically have been conditioned on availability of capacity on the Intertie.

Decision

The Near Term Intertie Access Policy expressly provides that BPA's allocation of its portion of the Intertie will not conflict with BPA's existing contractual obligations. (Final Policy, section II.C.3.b.(1).) Parties who have entered into contracts to which BPA is not a party, however, have entered into a contract subject to BPA's Near Term Intertie Access Policy.

2. Western - BPA Memorandum of Understanding

Issue #1: Summary of Comments

There were several comments suggesting that BPA should not have entered into the Memorandum of Understanding (MOU) with Western for transmission of 185 megawatts of Basin Electric Power over the Intertie to Western's customers in northern California. (Driscoll, MPSC, letter dated 8/10/84, p. 3; Ste[a]rns, NCAC, letter dated 8/9/84, p. 2.) Another comment suggested that BPA omit the BPA-Western MOU with its obligation to transmit Basin Electric Power from the list of existing obligations that BPA recognized as outside the proposed Intertie Access Policy. (Cavanaugh, NRDC, letter dated 8/13/84, pp. 8-9.)

Other comments commended BPA for its action regarding the contract between Western and Basin Electric Power. (O'Banion, SMUD, letter dated 8/10/84, p. 3.) Another comment expressed approval for the MOU and concern about the absence of long term provisions for the delivery of energy under the Western Basin Electric power sales contract. (Pugh, NCPPA, letter dated 8/13/84.)

Evaluation of Comments

BPA has considered these and other similar comments received in response to its environmental assessment for the BPA Western MOU. BPA's position respecting these comments was set forth in the decision record on that MOU dated February 7, 1984, as follows:

We have determined that the MOU does not predetermine the results of BPA's Intertie Access Policy. The MOU recognizes a need of Western to transmit electric power for which it is under an obligation to pay a share of the costs even if it does not take delivery and an affirmation by BPA that we will use our ownership and managerial responsibility for the northern part of the Intertie to assist in meeting Western's needs.

Decision

The Basin Electric - Western contract is an existing firm contract and will be treated as such in the manner specified in the BPA - Western MOU of February 7, 1984.

D. Fish and Wildlife Provision

1. BPA's Authority

Issue #1: Summary of Comments

The draft Intertie Access Policy proposed to condition or deny access for resources that adversely affect the Administrator's efforts on behalf of fish and wildlife. The PNUCC and PSP&L assert BPA has no explicit authority to regulate the operation of non-Federal hydroelectric projects as an element of the Intertie Access Policy, and the PNUCC and IPC call the proposal an additional unauthorized layer of regulation. (Hardy, PNUCC, letter dated 8/13/84, p. 1; Hardy, PNUCC, TR 181-82; Bailey, PSP&L, letter dated 8/13/84, p. 5; Barclay, IPC, letter dated 8/13/84, pp. 2-3; Schultz, ICP, TR 184.) In a prior document dated March 16, 1984 (submitted with its 8/13/84 letter), however, PNUCC took the position that BPA has discretion to address fish and wildlife matters in furnishing surplus power marketing or related transmission service to its customers. (Hardy, PNUCC, letter dated 8/13/84, attachment 1, pp. 17-18.) Specifically, PNUCC stated that under section 9(i) of the Northwest Power Act, BPA may address whether furnishing service would conflict with policies of the Northwest Power Act, including protection, mitigation, and enhancement of fish and wildlife, as well as assurance of an adequate, efficient, reliable, and economical power supply, among other things. PNUCC also stated that BPA may deny service on this basis. (*Id.* at pp. 18 and 31.) Furthermore, PNUCC recognized that the Intertie Access Policy involves the

management and use of Federal property over which Congress has plenary authority. (*Id.* at p. 20.)

The ICP believes there is no logic, no justification, and no authority for BPA to apply a fish and wildlife qualification to a transmission access policy. (Schultz, ICP, letter dated 8/10/84, p. 3; Schultz, ICP, TR 11 and 13.) The ICP believes that the time for taking fish and wildlife into account is in the licensing and permitting process. (Schultz, ICP, TR 11-12.) EWEB does not believe that the output of any hydroelectric project, while operating in full conformance with its FERC license, may be denied access to the Intertie. (Parks, EWEB, letter dated 8/10/84, p. 1.)

On the other hand, the NWF argues that BPA has and must employ its discretion in a manner not in conflict with the policies of the Northwest Power Act. (Thatcher, NWF, letter dated 3/16/84, p. 1.) From this assumption, it reaches the conclusion that BPA must manage the Intertie in a manner consistent with the Northwest Power Planning Council's Fish and Wildlife Program. (Thatcher, NWF, letter dated 3/16/84, p. 4.) In a comment dated March 7, 1984 (incorporated by reference in its 8/13/84 letter) the NRDC stated that BPA has legal authority to condition access to its transmission system for the protection of fish and wildlife. The NRDC urges that BPA exercise its discretion in a manner consistent with the Council's Fish and Wildlife Program. (Cavanagh, NRDC, letter dated 3/7/84, pp. 4-5.)

The NMFS and CRITFC agreed that BPA has authority to impose fish and wildlife conditions on Intertie access. (Bodi, NMFS, TR 291; Wapato, CRITFC, letter dated 3/16/84, p. 2.) The NPPC believes that BPA is required to take action on Intertie

access that is consistent with the Council's Fish and Wildlife Program. (Colbo, NPPC, letters dated 3/16/84, p. 1, and 8/11/84, p. 1.)

Evaluation of Comments

Although BPA's proposed fish and wildlife provisions apply generally to power from any existing non-Federal resources it should be understood at the outset that most comments, both from the utility community and from those concerned about adverse effects on fish and wildlife, have focused on non-Federal hydroelectric projects. BPA intends that the Intertie Access Policy apply a single standard to non-Federal hydroelectric and nonhydroelectric generating resources. However, BPA recognizes that differing regulatory regimes at the state and Federal level may apply to individual resources. For purposes of BPA's evaluation of comments here, however, BPA's concerns with accommodating the role of the Federal Energy Regulatory Commission (FERC) also apply to others with regulatory authority over a particular resource.

BPA has the authority to impose fish and wildlife conditions on non-Federal access to its share of the Intertie capacity. The electrical energy produced at each of the 31 dams in the Federal Columbia River Power System and the facilities for transmitting that energy, are property of the United States. Authority to dispose of that property is expressly granted to Congress by Section 3 of Article 4 of the Constitution of the United States. Congress exercises complete power under the property clause, and may constitutionally direct the disposal of such property in a manner consistent with Congress' view on public

policy, which may include concerns for competition and the widespread distribution of benefits.

The construction of the Intertie was an exercise of Congress' broad authority under the property clause. The manner in which Congress exercised that authority is reviewed in a separate section of this Record of Decision. (See section III(A)(2).) Congress authorized Federal construction and ownership of approximately 75 percent of the Intertie capacity, approximating BPA's share of the regional power surplus at that time, to assure Federal control of BPA's share of that market. The Regional Preference Act (section 6), the Transmission System Act (section 6), and the Northwest Power Act (section 9), ensure that BPA satisfies Federal needs first. Thereafter, BPA may dispose of its remaining Intertie capacity to non-Federal entities on a fair and nondiscriminatory basis, as long as their use does not conflict with the Administrator's Power Marketing Program, BPA operating conditions, existing contracts, and applicable law, including the policies of the Northwest Power Act.

This authority must be read *in pari materia* with BPA's other organic authorities, including the Bonneville Project Act, such as subsections 2, 6, and 7, and other provisions of the Northwest Power Act, such as sections 2 and 4. (See, *Disposition of Surplus Power Generated at Clark Hill Reservoir Project*, 41 Op. Att'y IG. 236 (1955).) For example, BPA concluded that section 2(f) constitutes an extremely broad grant of authority that authorized BPA to expand monies for fish purposes. (Authority of Bonneville Power Administrator to Participate in Funding of Program to Help Restore the Columbia River Anadromous Fishery, M-

36885, 83 I.D. 589, at 597 (Nov. 22, 1976).) Of course, the Northwest Power Act explicitly authorizes expenditures for fish and wildlife. (See, for example, section 4(h).) NEPA also supports the Administrator's authority to apply environmentally sensitive criteria to BPA's marketing program.

BPA is not suggesting that any one statutory purpose of policy, e.g., protection of fish, is an overriding policy under these laws. As the PNUCC pointed out, the Northwest Power Act furthers not only protection, mitigation, and enhancement of fish and wildlife, but also the assurance of an adequate, efficient, [sic] reliable and economical power supply, among other purposes. (PNUCC, letter dated 3/16/84, attachment 1, p. 31.) Under the Bonneville Project Act, Transmission System Act, Regional Preference Act, and Northwest Power Act, BPA's Marketing Program serves a broad use standard that permits the exercise of the widest administrative discretion. The United States Supreme Court recently has recognized that BPA's interpretation of its statutory authority is to be accorded great weight, particularly in interpreting the Northwest Power Act, which is a recently enacted statute in the passage of which BPA actively participated.

There is ample authority for BPA to condition access to its share of the Intertie capacity on a fish and wildlife basis. The question then becomes, as NWF and NRDC have observed, what use should BPA make of this authority?

Decision

BPA recognizes that the Northwest Power Act preserved the pre-existing regulatory authorities of state and Federal agencies, but BPA finds nothing in the Northwest Power Act to suggest that BPA lacks authority to protect BPA's very significant and growing investment in fish and wildlife protection, mitigation, and enhancement. BPA has determined that it is reasonable to use this authority to condition or deny Intertie access to existing Pacific Northwest resources if the operation of the resource would decrease the effectiveness of or increase the need for expenditures or other actions by the Administrator, or would otherwise interfere with his obligations, to protect, mitigate, and enhance fish and wildlife.

2. BPA's Exercise of Authority

Issue #1: Summary of Comments

BPA proposed in the draft Policy to exercise its authorities to assure that where the operation of an existing resource will adversely impact the fish and wildlife resources in a manner that adversely affects the Administrator's own efforts on behalf of fish and wildlife, either Intertie access will not be provided or, as a condition of access, the owner or operator of the resource will be required to modify the operation of the resource or take offsite mitigative action equal to the adverse impact. Generally, the Pacific Northwest utilities and their representative organizations believe that resource operations are adequately regulated by FERC, and that FERC should remain the exclusive regulatory body for this purpose. They believe that

either BPA does not have authority or BPA should not exercise any authority it may have to place additional requirements on resource operations as a condition for Intertie access. (Hardy, PNUCC, letter dated 8/13/84, p. 1; Hardy, PNUCC, TR 181; Bredemeier, PGE, letter dated 8/13/84, p. 1; Boucher, PP&L, letter dated 8/13/84, p. 3; Barclay, IPC, letter dated 8/13/84, p. 6; Bailey, PSP&L, letter dated 8/13/84, p. 5; Brawley, PPC, letter dated 8/13/84, p. 2; Nadal, PNGC, letter dated 8/13/84, p. 1; Parks, EWEB, letter dated 8/10/84, p. 6; Labrie, MPC, letter dated 8/13/84, p. 2; Garman, PGP, letter dated 8/19/84, p. 1; Schultz, ICP, letter dated 8/10/84, p. 4, TR 11, 13; Copp *et al.*, Mid-Col. PUD's, letter dated 8/10/84, pp. 1-2.) Moreover, the PNUCC believes that BPA would be encroaching on FERC's authorities if BPA were to require modifications in the operations of a project or other actions that might be inconsistent with a project license. (Marritz, PNUCC, letter dated 8/21/84, p. 1.)

The NWF, on the other hand, believes that BPA should not only impose conditions to avoid or mitigate adverse impacts on the Administrator's own efforts on behalf of fish and wildlife, but BPA also should impose conditions to cure any other harmful effects of resource operation on fish and wildlife and environmental quality. (Thatcher, NWF, letter dated 8/13/84, p. 5.) The NMFS agrees that fish and wildlife conditions should be imposed to protect BPA's investment, but suggests that BPA go further. BPA should not enable or encourage resources which adversely affect anadromous fish. (Bodi, NMFS, TR 292.)

The Mid-Col. PUD's urge the deletion of the fish and wildlife provisions since the Policy will apply only

to existing resources including the mid-Columbia dams, which are under an open petition before FERC, and could not be influenced by BPA in a contravening process. (Copp *et al.*, Mid-Col. PUD's letter dated 8/10/84, p. 2.) NMFS has suggested access be denied to any resource that has been formally contested and is awaiting resolution. (Evans, NMFS, letter dated 8/13/84, p. 2.)

Evaluation of Comments

Some utilities assert that inclusion of such provisions is inappropriate because operations of existing resources are adequately dealt with by state and Federal agencies with legal authority over fish and wildlife issues. (Bredemeier, PGE, letter dated 8/13/84, p. 1; Nadal, PNGC, letter dated 8/13/84.) PPC and PGP believe that BPA must recognize FERC's role. PGP believes that any action by BPA is premature, while PPC believes that BPA should not use its authorities or responsibility to deny a utility access to the Intertie when the utility is acting in accordance with its FERC license. (Brawley, PPC, letter dated 8/13/84, p. 2; Garman, PGP, letter dated 8/9/84, p. 1.) BPA expresses no opinion as to the adequacy of present regulation of existing resources by FERC, but does agree with the PNUCC that FERC's authorities were preserved by the Northwest Power Act and does respect the regulatory role assigned to FERC. As NWF has indicated, BPA is not regulating, but is simply effecting public policy decisions about how to rationally allocate a limited amount of space on the Intertie, over which BPA maintains substantial control. (Thatcher, NWF, TR 289.) BPA does not intend to supplant FERC's role.

However, BPA does not concede that it has any duty to provide Intertie access to any resource operating in compliance with its FERC license. Even as FERC's regulatory role over resource operations is preserved by the Northwest Power Act, BPA's role as proprietor of the Intertie is exclusive and not delegable to FERC. BPA's proposed Policy provisions give appropriate deference to FERC. They provide that when a resource is not being operated in compliance with applicable law, it will be denied access if it also is adversely affecting the Administrator's efforts on behalf of fish and wildlife. The provisions also provide that as an alternative when modifying resource operations is not practically or legally possible, a resource owner or operator who is in compliance with applicable law but is causing adverse effects on fish and wildlife may negotiate offsite enhancement or other actions not inconsistent with the NPPC's Fish and Wildlife Program to offset the resource's adverse effect on the Administrator's interests. Accordingly, PNUCC's concerns that enforcement of BPA's Policy would necessarily result in superceding, or violating, an applicable FERC license are unfounded. (Marritz, PNUCC, letter dated 8/21/84, p. 1.)

Both the Mid-Columbia PUD's and NMFS have raised questions as to BPA's role and determinations on providing access to a resource, the continued operation of which is under challenge or open petition before FERC. The Mid-Columbia's believe BPA should not take action respecting such a resource in a contravening process. (Copp, *et al.*, Mid-Col. PUD's, letter dated 8/10/84, p. 2.) NMFS, on the other hand, would have BPA deny access pending resolution of any challenge. (Evans, NMFS, letter dated 8/13/84, p. 2.) BPA understands in cases such as these, a presumption

of compliance with law clearly may be disputed. BPA, however, can not appropriately presume noncompliance with the law, nor can BPA resolve that dispute. BPA also realizes that FERC, in accepting such a challenge or otherwise reviewing a license, is exercising its own very comprehensive jurisdiction. BPA is not willing to defer to FERC respecting which resources will be provided Intertie access, or which resources in their operation may adversely affect the Administrator's efforts on behalf of fish and wildlife. In any case such as this, BPA will be called upon to scrutinize closely whether operation of the resource would adversely affect the Administrator's efforts on behalf of fish and wildlife. BPA's determination must be made on the basis of applicable facts, particularly relating to the adverse effect on the Administrator's efforts, after an opportunity for comment from the public and interested parties.

PNUCC and MPC point out that section 4(h)(11)(A) of the Northwest Power Act requires that FERC regulate existing resources taking into account the Council's Fish and Wildlife Program to the fullest extent practicable. (Hardy, PNUCC, letter dated 8/13/84, p. 5; Labrie, MCP, letter dated 8/13/84, p. 2.) PNUCC argues that if BPA finds that the operation of any non-Federal projects harms its own fish and wildlife protection efforts, BPA should petition FERC for relief. (Hardy, PNUCC, letter dated 8/13/84, p. 5.) BPA realizes that this avenue exists, and may from time-to-time take advantage of it, particularly in a case where operation of a resource invariably causes or would cause an adverse effect on the Administrator's efforts on behalf of fish and wildlife. However, BPA believes that it has an affirmative duty to utilize its own authorities in a manner that will achieve the purposes

of the Act — in this case, protecting, mitigating and enhancing fish and wildlife — while acting in a sound and business-like manner.

The standard BPA proposes to utilize is derived from those two mandates, and by its application, BPA believes it will have fulfilled its legal responsibility. NWF asserts that the Policy should be amended such that access will not be provided if the operation of a resource would have any adverse affect on fish and wildlife resources or environmental quality, *as well as* if the operation would decrease the effectiveness or increase the need for additional expenditures or other actions by the Administrator to protect, mitigate, and enhance fish and wildlife. (Thatcher, NWF, letter dated 8/13/84, p. 5.) Necessarily, not all adverse effects on fish and wildlife caused by resource operation will be susceptible to correction by the application of a standard based on adverse effects on the Administrator's efforts, even though his expenditures are substantial and his undertakings far-ranging. From the point of view of fish and wildlife advocates, this is its weakness. (Thatcher, NWF, letter dated 8/13,84, p. 5.)

BPA believes that application of the first standard cited by NWF, *i.e.*, where operation of a resource would have any adverse affect on fish and wildlife resources or environmental quality, is precisely the role preserved for FERC under the terms of section 10(i) of the Northwest Power Act. BPA is directed to apply the 4(e)(2) standards only in the acquisition of new resources. (See sections 6(a) and 6(b)(2) of the Northwest Power Act.) To protect his substantial investment in fish and wildlife resources, the Administrator has chosen a standard based upon adverse

effects on his own efforts on behalf of fish and wildlife. BPA believes that for other adverse effects, a diverse array of other applicable regulatory schemes are available for enforcement by appropriate authorities.

Seattle City Light (SCL) suggests that BPA's determination that a resource's operation adversely affects the Administrator's efforts on behalf of fish and wildlife should be made subject to FERC review and approval. (Saven, SCL, letter dated 8/23/84, p. 4.) BPA can find no authority for such a role for FERC. FERC's authority does not reach governing access to the Intertie, any more than does BPA's authority reach the regulation of the operation of non-Federal hydroelectric resources.

In developing the standard, BPA recognizes the necessary balance between resource regulation, which is reserved to FERC, and protecting fish and wildlife resources in a sound and business-like manner, which is the Administrator's responsibility. As BPA pointed out in the hearing, BPA must define its appropriate jurisdiction and not assume the regulatory jurisdiction of other agencies. (McLennan, BPA, TR 283.) In providing Intertie access, the Administrator is not responding to a pre-ordained right accorded by FERC to the owner or operator of a resource. The Administrator is exercising his discretion to bestow a privilege and a benefit of access on power from a resource or collection of resources. This is consistent with BPA's authority to dispose of surplus Federal property such as Intertie capacity owned and controlled by BPA. That benefit enlarges the market for such power, but denial of that benefit does not vitiate the resource or prevent its operation consonant with applicable law.

As NWF points out in arguing for consistency with the Council's Plan, "A conditioned Intertie Access Policy does no more than guarantee that a publicly controlled instrumentality will not be used to encourage or facilitate" resources that meet energy needs at greater regional economic and environmental costs. (Thatcher, NWF, letter dated 3/16/84, p. 5.) BPA is "making public policy decisions about how to rationally allocate a limited space on a tie line over which [BPA] maintain(s) substantial control, . . . and (BPA) can certainly say that [BPA is not] regulating." (Thatcher, NWF, TR 288-89.) The question is not whether the project can operate in violation of the Program, but whether BPA will provide operators access to the Intertie to sell the power they produce in violation of the Program. (*Id.*) "[BPA] is not telling [operators] how to operate their project unless they want to get the advantage of [BPA's] Intertie." (*Id.*)

PNUCC has pointed out that BPA should restrict its scope of concern to the time and amount of impact actually caused by the resource operation enabled by access. (Hardy, PNUCC, TR 182-84.) While BPA understands that its appropriate concern for fish and wildlife in this Policy is triggered by the provision of access, BPA does not conclude that the mitigation to be sought for errant resources should be so limited as the PNUCC seems to suggest. BPA's efforts are not so much directed at recovering damages for past actions which adversely affect the Administrator's efforts on behalf of fish and wildlife, though that may in some cases be necessary. As NWF has pointed out, it is operation of a resource that adversely affects fish and wildlife, not access to the Intertie. (Thatcher, NWF, TR 281.) The standard has now been clarified; access will only be provided if it will not result in scheduling

energy from resources whose operation will adversely affect the Administrator's efforts on behalf of fish and wildlife. BPA's emphasis will be on obtaining assurance that future operation of such a resource cause no future adverse impact. As indicated by the Policy, this may be accomplished either by modification of the operation or by some compensatory offsite action, when it is impractical to modify resource operation.

Decision

BPA has determined that it is reasonable to exercise its authorities, including those respecting fish and wildlife, to assure that existing resources that might adversely impact BPA's fish and wildlife expenditures do not gain Intertie access, unless the owner or operator modifies the operation of the resource, or mitigates for the impacts to the resource in a manner not inconsistent with the Council's Fish and Wildlife Program. Capital facilities costing over \$500 million are in place or under construction to mitigate adverse effects on Federal hydroelectric development on Columbia River fish and wildlife. BPA is repaying this sum to the U.S. Treasury over time with interest. BPA also annually reimburses the Treasury for the operations and maintenance costs incurred by Corps of Engineers, Bureau of Reclamation, and U.S. Fish and Wildlife Service associated [sic] with these facilities. In addition, BPA makes direct expenditures from its revenues, uses its borrowing authority and forfeits revenue as a result of modified operation of the system in order to fulfill its obligations to further protect, mitigate, and enhance fish and wildlife. BPA's fish and wildlife budget for 1985 will be \$34 million, and loss of revenue as a result of modified operation has been

estimated to average as much as \$58 million per year depending on applicable rates, and water and power marketing conditions. BPA feels it is appropriate to exercise its authorities to protect this significant investment.

BPA also believes it is reasonable to defer to FERC and other Federal and state agencies with jurisdiction over resource operations that adversely impact fish and wildlife. In this way BPA's role as proprietor of the Intertie will not encroach upon other agencies' jurisdiction over resource operations that impact on fish and wildlife. BPA retains the prerogative, however, to participate in other agency proceedings, such as those before FERC, to protect BPA's investment in fish and wildlife protection, mitigation and enhancement.

3. Consistency With the Council's Fish and Wildlife Plan and Program

Issue #1: Summary of Comments

As a part of its proposed Policy provisions to protect, mitigate, and enhance fish and wildlife, BPA did not require consistency with the Council's Fish and Wildlife Program. The NPPC believes that BPA has a legal duty to act consistently with the Council's Program. (Colbo, NPPC, letter dated 8/11/84, p. 1.) CRITFC, NWF, and NMFS generally support the idea that BPA should require resources to operate consistent with the Council's Plan and Program as a condition of Intertie access. (Wapato, CRITFC, letter dated 3/16/84, p. 1; Thatcher, NWF, letters dated 3/16/84, p. 2, and 8/13/84, p. 3; Thatcher, NW[F], TR 278, 290; Evans, NMFS, letters dated 3/15/84, p. 1, and 8/13/84, p. 1; Bodi, NMFS, TR 292.) The PNUCC

and PP&L believe that the Council's Program is not applicable to transmission access, and the PNUCC asserts the Council must deal with FERC, not BPA, on regulation of non-Federal hydroelectric facilities. (Hardy, PNUCC, letter dated 8/13/84, pp. 2, 7-8; Boucher, PP&L, letter dated 8/13/84, p. 3.) In earlier comment, the PNUCC had suggested that the policies of the Northwest Power Act were applicable to transmission access, and such access could be denied on that basis. (Hardy, PNUCC, comments dated 3/13/84, p. 31.) The OPUC, WPSC, and Clark County PUD urge that BPA not use its authorities as a means of enforcing the Council's Program. (Maudlin, OPUC, letter dated 8/9/84, p. 3; Jacquot, WPSC, letter dated 8/8/84, p. 2; Sanders, Clark, letter dated 8/10/84, p. 1.)

Evaluation of Comments

NWF asserts that the Administrator should indicate that BPA has taken the Council's Fish and Wildlife Program into account in formulating the Intertie Access Policy, has determined to require consistency to the greatest extent practicable, and will provide access only to utilities that operate their existing resources consistent with the Council's Fish and Wildlife Program, unless that is legally or physically impracticable. (Thatcher, NWF, letter dated 8/13/84, p. 3; Thatcher, NWF, TR 278-79.) NWF asserts that the Administrator has already made a commitment to act consistent with the Council's Energy Plan. BPA has recognized that the Council's Plan, though a fluid, changing document, provides guidelines for the future development of the Pacific Northwest power system, and intends to be guided by it in the acquisition of

resources and in the protection, mitigation, and enhancement of fish and wildlife. (BPA, Implementation Programs for the Northwest Power Planning Council's Two-Year Action Plan, August 1983, pp. i-viii.)

BPA, however, has not committed to follow either the Plan of the Fish and Wildlife Program under all circumstances. BPA takes note of the dictionary definition of consistent: agreeing, compatible, not contradictory, conforming to the same principles or course of action (The American Heritage Dictionary of the English Language); or, marked by harmony, regularity, or steady continuity throughout, showing no significant change, unevenness, or contradiction (Webster's Third New International Diction, Unabridged). BPA believes it is acting, and intends to continue to act, consistent with the Council's Plan and Fish and Wildlife Program with respect to those subjects within the jurisdiction of the Council as defined in the Northwest Power Act. The Administrator however will not forfeit his duty to make independent decisions using not only the standard of consistency but other applicable standards and authorities.

The NPPC's assertion that BPA has a legal duty to act consistently with the Council's Program is based on their reading of section 4(h)(10)(A) of the Northwest Power Act. (Colbo, NPPC, letter dated 3/16/84, p. 1.) CRITFC urges that section 4(h)(10)(A) extends beyond funding to all of the Administrator's authorities. (Wapato, CRITFC, letter dated 3/16/84, p. 2.) In that subparagraph the Administrator is instructed to use the Bonneville Fund and other authorities available to him to the extent affected by the development and

operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the Council's Energy Plan, Fish and Wildlife Program, and the purposes of the Northwest Power Act. The OPUC believes BPA should not be jury and judge in regard to consistency with fish and wildlife programs, that access to the Intertie is not an appropriate tool for enforcing compliance with fish and wildlife policies, and that BPA should seek its remedies in court. (Maudlin, OPUC, letter dated 8/9/84, p. 3.) The WPSC asserts that BPA should not set itself up as the enforcer of the Council's policies by conditioning access on compliance with the Fish and Wildlife Program, since the Council has no regulatory authority. (Jacquot, WPSC, letter dated 8/8/84, p. 2.)

Even if, as a matter of Policy, BPA were to accept the Council's interpretation of "the authorities available to the Administrator under this Act and other laws administered by the Administrator," BPA still must relate its intent to condition Intertie access on fish and wildlife concerns to his undertakings pursuant to section 4(h)(10), which are limited by the extent fish and wildlife are affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries. PSP&L points out that section 4(h)(10)(A) and 4(h)(11)(A) authorities are related only to hydroelectric development. (Bailey, PSP&L, letter dated 8/13/84, p. 6.) With this in mind, BPA has developed a standard which relates its section 4(h)(10)(A) authorities to its proposed management of the Intertie. BPA believes this linkage is required if it is to give meaning to all parts of applicable law.

Further, if BPA were to accept CRITFC's and the Council's interpretation, the question would remain

whether the Council has any authority under the Northwest Power Act to include measures or policies in their Plan or Program to require the Administrator to exercise BPA's proprietary responsibilities over the Intertie in any particular manner.

PNUCC asserts that the consistency standard provided for in section 4(h)(10)(A) of the Northwest Power Act does not apply to transmission system management. This argument rests on the theory that the other authorities referred to in section 4(h)(10)(A) of the Northwest Power Act were generically related to the expenditures of funds. PNUCC points out that Congress in section 4(h)(11)(A) specified a different standard for other responsibilities of the Administrator's and questions why section 4(h)(11) would have been at all necessary vis-a-vis BPA if section 4(h)(10)(A) applied to BPA authorities other than expenditure of funds. (Hardy, PNUCC, letter dated 8/13/84, p. 2.) Similarly, PP&L notes that Congress has been explicit in requiring consistency respecting resource acquisition and fish and wildlife expenditures and concludes that BPA should not imply such a standard to condition access to the Intertie on a utility's compliance with the Council's Energy Plan or Fish and Wildlife Program. (Boucher, PP&L, letter dated 8/13/84, p. 3.) To the extent the Plan or Fish and Wildlife Program deals with subjects not within the jurisdiction of the Council, BPA believes those provisions would have no force and effect.

Only one of the commenters urging that BPA require consistency with the Council's Fish and Wildlife Program as a condition for providing Intertie access, specified which portions of the program they thought provided guidance respecting operation of

resources or transmission access. NPPC indicated Sections 1304(a)(1), 1304(a)(3), and portions of 1200 of the Program as relevant to Intertie access. (Colbo, NPPC, letter dated 3/16/84, pp., 1-2.) In response to a question from BPA at the public comment forum on Tuesday, July 24, 1984, NWF and [CRIFTC] suggested Section 300, calling for a Water Budget, Section 400, on downstream passage, and Section 1200, on new hydro, as relevant sections. (Thatcher, NWF, TR 284: Lothrop, CRITFC, TR 284.) Because this interim adoption of the Intertie Access Policy only deals with power from existing Pacific Northwest resources and Section 1200 applies to *development* of hydroelectric facilities, consistency with Section 1200 does not appear to be an issue.

Section 300 by its terms is directed to the Federal project operators and regulators. From BPA's perspective, the Water Budget is implemented by de-rating the amount of firm energy load carrying capability in submissions under the Coordination Agreement and in studies that form the basis of BPA ratemaking. Accordingly, that amount of power that is set aside to assure the spring fish flush will not be generated and transmitted over the Intertie at other times in the year. BPA's authorities with respect to that power are exercised taking into account to the fullest extent practicable the Council's Fish and Wildlife Program, as required by section 4(h)(11)(A) of the Northwest Power Act. BPA has an additional concern that the benefit to fish and wildlife of that action not be diluted or impaired by the operation of any non-Federal resource that might enjoy the privilege of Intertie Access. Accordingly, the Intertie Access Policy provides that BPA, before or as a result of according that privilege to a scheduling utility, may require that

the operation of that non-Federal resource be in compliance with applicable licenses, permits and law, and that operations either be modified or other actions taken to offset any adverse impact on the Administrator's efforts on behalf of fish and wildlife.

With the exception of providing funds for some studies, the Council requests BPA to take no action under Section 400 of the Council's Fish and Wildlife Program. Section 400 is primarily directed to the Corps of Engineers and the Federal Energy Regulatory Commission. With respect to several non-Federal projects, Section 400 calls on FERC to exercise its regulatory jurisdiction to require those projects to take certain actions. FERC has authority to undertake such actions. BPA does not. If FERC fails to heed the Council's Fish and Wildlife Program, BPA cannot fulfill FERC's role through denial of Intertie access for energy from a resource. If FERC imposes terms and conditions that the owner or operator of such a resource fails to heed, presumably the resource will not be in compliance with its license or permit. In that event, if operation of the resource impairs the effectiveness of the Administrator's expenditures or actions, or otherwise interferes with the Administrator's obligations to fish and wildlife, BPA will deny access to the Intertie under the terms of this Policy. In that event, the Council's purpose will be served.

Section 1304(a) addresses Federal agency operation and regulation of Federal hydroelectric projects. In exercising its management and operation responsibilities under the Northwest Power Act, BPA is specifically directed to take the Council's Program into account to the fullest extent practicable by section

4(h)(11)(A)(ii) of that Act. Therefore, BPA cannot be required to meet a different standard, consistency with the Program, through Section 1304(a) of the Program. This also is undesirable for the reasons discussed above in this section.

No fish and wildlife representative was willing to identify a resource in the region which he or she felt was operating inconsistently with the Council's Plan or Program. (Michie, BPA, TR 285; Thatcher, NWF, TR 286; cf. Bodi, NMFS, TR 292.) BPA asked one fish and wildlife advocate what would be gained by additional language in the Policy concerning consistency with the Program since BPA funds Program measures and impacts on those measures would be impacts on BPA's expenditures. (Michie, BPA, TR 290.) The NWF responded only that the substantial effect on BPA's efforts might not be coincident with the Fish and Wildlife Program obligations imposed on BPA. (Thatcher, NWF, TR 290.) As BPA has elsewhere pointed out, and as is borne out by the failure to identify any inconsistent resources, the problems to be attributed to resource operation are more apt to be seasonal, occasional or unanticipated. Accordingly, BPA feels little would be gained by adding a standard related to the Council's Program, which, though dynamic in the sense it will be updated biennially, is a document that cannot provide much guidance for unexpected aberrations in resource operation.

It is of course true, as NWF has pointed out, that BPA is not always able to accomplish full implementation of the Council's expectations, particularly in an instance where the cooperation or willingness of a necessary third party is involved. For example, IPC has raised the question of whether BPA would use the

Intertie Access Policy as a basis for refusing or conditioning Intertie access on whether IPC would develop a plan for wildlife mitigation associated with one of its projects after BPA had expended funds on identifying wildlife mitigation status as requested in the Council's Program. (Barclay, IPC, letter dated 8/13/84, p. 13.) BPA's Fish and Wildlife Provisions in the Intertie Access Policy are directed at discouraging resource operation which would adversely affect the Administrator's efforts on behalf of fish and wildlife. BPA does not assume that refusal to develop a plan for wildlife mitigation at a hydroelectric project is an element of project operation. The fact that BPA cannot assure full performance of the Council's Fish and Wildlife Program in this instance is an argument in itself for not attempting to do so by means of a consistency standard.

The Council has included proposed language changes with its comments requiring, among other things, consistency with the Council's Fish and Wildlife Program. NPPC also has included language which would recognize their Fish and Wildlife Program as "applicable law." (Colbo, NPPC, letter dated 8/11/84, attachment 2, p. 3.) Whether the Program has the status of applicable law is beyond the scope of this Policy, or this evaluation. If what the Council seeks with respect to non-Federal resources is a means of enforcing its program in view of FERC's indifference, this is clearly not an appropriate role for BPA. If what the Council seeks is application of a different standard of "consistency" when FERC is bound to take the Fish and Wildlife Program "into account to the fullest extent practicable," this is clearly not what Congress provided.

BPA notes that included in the changes proposed by the Council is the insertion of the words "directly or indirectly" to modify providing access. The draft defines "Indirect access" as transmission by an owner or operator of resources that are inconsistent with the Council's Program, and proposes that the penalty for such "indirect access" or transmission of an inconsistent resource would be reduction in the amount of access accorded that owner. Exactly how one determines whether a resource is or may become inconsistent is not made clear. While the proposed reduction of access may be one appropriate means of enforcing its Policy based on the standard BPA has set, BPA believes that the Council's proposal that access be reduced on the test of consistency is not presently workable, and that its reach is beyond the Council's jurisdiction.

Decision

BPA believes that its Intertie Access Policy is consistent with the Council's Program in so far as it concerns: (1) BPA's implementation of the Council's Water Budget; (2) denying access to an existing Pacific Northwest resource that is not operating in compliance with applicable licenses, permits and law and that is adversely affecting the Administrator's efforts on behalf of fish and wildlife; and (3) providing a means to remedy the operation of existing Pacific Northwest resources that are adversely affecting the Administrator's efforts on behalf of fish and wildlife. After review of all BPA's authorities, and reading them *in pari materia*, BPA believes that the Fish and Wildlife provisions of the Policy best reconcile and fulfill BPA's statutory directives. BPA does not believe requiring

consistency with the Council's Fish and Wildlife Program for non-Federal resources as a condition of Intertie access would provide additional benefits without creating unacceptable uncertainty and ambiguity.

4. Procedural Issues

Issue #1: Summary of Comments

The draft Policy proposed to define "substantial," when referring to "substantially decrease, increase, or interfere," as meaning a change that is significant, and measurable or identifiable. (Draft Policy, p. 22.) The NMFS believes the term "substantially" could be subject to varying interpretations. (Evans, NMFS, letter dated 8/13/84, p. 2.) IPC believes that the language in the Policy is subject to various interpretations, making its application discretionary. (Barclay, IPC, letter dated 8/13/84, p. 1.) The PNUCC has submitted a proposed revision that would change the definition of "substantial decrease, increase, or interfere" to mean a change that is serious, considerable and measurable. (Hardy, PNUCC, letter dated 8/13/84, attachment 2, p. 6.) According to the PNUCC, the effects of non-Federal projects that BPA seeks to guard against must be substantial before Intertie access is refused. (Hardy, PNUCC, letter dated 8/13/84, p. 6.)

NWF pointed out that the draft Policy used different language in subsections 6(c) and 6(d), and indicated its preference for the language in subsection 6(c). (Thatcher, NWF, letter dated 8/13/84, p. 6.) NWF also suggested that BPA define how it will take

the Council's Program into account to the fullest extent practicable. (Thatcher, NWF, TR 278.)

Evaluation of Comments

BPA agrees that its original definition of substantial could be improved, and has done so in the revised Policy. While BPA did not fully accept PNUCC's proposal, BPA believes that its definition addresses PNUCC's concerns. "Substantial" is now defined as a change that is of qualitative significance, of significant measurable effect, or of sufficient magnitude to require remedial action.

NWF has suggested there is a difference in the standards of subsection 6(c) and 6(d) of the draft Policy. (Thatcher, NWF, letter dated 8/13/84, p. 6, TR 282-84.) BPA notes that subsection 6(d) provides for the denial of access for those resources that are both adversely affecting the Administrator's efforts on behalf of fish and wildlife, and also not being operated in compliance with applicable licenses, permits or other applicable law. Section 6(c) in the draft Policy provided means to mitigate adverse effects on the Administrator's efforts on behalf of fish and wildlife for those resources that were presumed to be in compliance with applicable licenses, permits and law. In the Policy as adopted, BPA has provided additional clarity with respect to how an interested person may challenge either the presumption that a resource is being operated in compliance with applicable law, or the presumption that operation of a resource is adversely affecting the Administrator's efforts on behalf of fish and wildlife. The Policy, however, remains unchanged. If NWF's comment on the difference in standards goes to the question of whether

or not BPA should rely on a rebuttable presumption, that issue is covered in the discussion immediately below.

Decision

BPA has concluded that a meaningful and workable definition of "substantial" is a change that is of qualitative significance, of significant measurable effect, or of sufficient magnitude to require remedial action. BPA has clarified the language governing presumptions respecting resource operation, and how such presumptions may be challenged, and hopes thereby to have addressed some of NWF's concerns.

Issue #2: Summary of Comments

The draft Policy created a rebuttable presumption, that existing resources operated or to be operated consistent with applicable licenses, permits, and state and Federal laws, are not adversely affecting the Administrator's efforts on behalf of fish and wildlife. The NMFS requests that the Policy clearly state that access only be allowed for projects that comply with Federal and state licenses and laws. (Evans, NMFS, letter dated 8/13/84, pp. 2-3; Bodi, NMFS, TR 293-94.) The NMFS and NWF question BPA's presumption that all hydropower projects are being operated consistent with the Council's Program, and that they are not adversely affecting the Administrator's obligation. (Evans, NMFS, letter dated 8/13/84, pp. 2-3; Bodi, NMFS, TR 292; Thatcher, NWF, letter dated 8/13/84, p. 5; Thatcher, NWF, TR 286.) However, neither was willing to identify any resource for which the presumption should not apply. (Thatcher, NWF,

TR 286; Bodi, NMFS, TR 292.) CRITFC believes that administration of presumptive consistency may work a hardship on the agencies and tribes to monitor day-to-day marketing activity. (Wapato, CRITFC, letter dated 8/13/84, p. 1.) IPC has asked that BPA make a determination in advance with respect to a submitted list of existing resources, that those resources can be operated in a manner that will not adversely affect the Administrator's efforts on behalf of fish and wildlife. (Barclay, IPC, letter dated 8/13/84, p. 17.) NMFS suggested a procedure whereby resource owners or operators would apply to the Administrator for such a determination. (Evans, NMFS, letter dated 8/13/84, p. 3; Bodi, NMFS, TR 294.)

Evaluation of Comments

The NWF and NMFS suggests that instead of the presumption, BPA require a certification under oath from the scheduling utility for each project for which access to the Intertie is sought. The scheduling utility would attest not only that any hydropower project is operating consistent with applicable licenses, but also that its operation is consistent with the Council's Fish and Wildlife Program. (Thatcher, NWF, letter dated 8/13/84, p. 5; Thatcher, NWF, TR 280; Evans, NMFS, letter dated 8/13/84, pp. 2-3; Bodi, NMFW, TR 294.) BPA is not the appropriate party to judge FERC provisions, as explained in the discussion above titled BPA's Exercise of Authority. As indicated in the discussion above on Consistency with the Council's Fish and Wildlife Program, BPA is unclear as to what provisions in the Program each existing Pacific Northwest resource should be consistent with, or how that consistency test is to be met. In order for BPA to

assess whether a resource would adversely affect the Administrator's efforts on behalf of fish and wildlife, NWF also urges that owners or operators of a resource should be required to provide BPA with a description of the resources' impacts on fish and wildlife. (Thatcher, NWF, letter dated 8/10/84, p. 6.) NMFS asks what information will be required from project operators, how will it be considered, and how will fish and wildlife agencies get to address it. (Bodi, NMFS, TR 295.) NMFS is also concerned that the Policy does not expressly provide for BPA consultation with the fish and wildlife agencies. (Bodi, NMFS, TR 293.) Among the procedures NMFS suggested were provisions that BPA require of scheduling utilities written requests for access, and annual reports of compliance, copies of which would be circulated to fish and wildlife agencies and Indian tribes for comment and consultation. (Evans, NMFS, letter dated 8/13/84, p. 3.)

BPA would point out that requests for assured delivery for firm contracts and requests for hourly allocation pose somewhat different issues when implementing the fish and wildlife provisions of the Intertie Access Policy. In terms of requests for assured delivery of firm contracts, BPA will be able to identify in advance which existing resources are being sold and absent any information to the contrary, will rely on a presumption that each resource is operating in compliance with law and will not adversely affect the Administrator's efforts on behalf of fish and wildlife. Should any fish and wildlife agency or Indian tribe have in hand information about the adverse effect of operation of any existing resource on the Administrator's efforts on behalf of fish and wildlife, of course that information should be brought to the attention of the Administrator. However, that initial determination

is not binding on the agency. It may frequently be the case that adverse effect on the Administrator's efforts will not be identified in advance, nor will such effect be sustained in duration or invariable, but rather seasonal, occasional or unanticipated. (*See, Hardy, PNUCC, TR 183.*) Accordingly, BPA does not believe a one-time determination, or certification for resources being sold under firm contracts, even with annual review, is the preferred way to effectuate the Policy.

Prospective discovery of resources for which allocation may be sought under Conditions 1, 2, and 3 is not possible on an hour-by-hour basis. The CRITFC has recognized the difficulty in monitoring hourly sales and requests that some kind of monitoring procedure be established to make the Policy meaningful. (*Lothrop, CRITFC, TR 287.*) For this reason, among others, BPA has added section II.C.6. to the Policy, providing that as a condition of access the Administrator may require a scheduling utility to provide a list of resources that are to be operated or that were operated at such hours as access to the Intertie will be or was provided. When the Administrator believes that operation of a resource, whether under a firm contract or an allocation, may be adversely affecting his efforts on behalf of fish and wildlife, whether upon the challenge of an interested person or upon his own motion, he will have the means to identify whether and when that resource was being operated for transmission on the Intertie. Upon challenge the Administrator will make a determination in view of applicable facts, not only about the resource operation in question but also about the manner in which his expenditures or other actions are adversely affected.

Under the terms of the final Policy, fish and wildlife agencies will be notified of challenges since they are entities responsible for administering applicable law. Fish and wildlife agencies and Indian tribes may also bring challenges as interested persons under the Policy. (See, section 7(d)(e) of the Policy.) Operators will be required to provide any information relevant to a challenge. Detailed procedures will be developed during the pendency of the Near [sic] Term Intertie Access Policy.

Decision

Because all existing resources are well-known or easily identified, BPA has elected to use the rebuttable presumption that resources are being operated in compliance with applicable law and are not adversely affecting the Administrator's efforts on behalf of fish and wildlife. With respect to allocation under Conditions 1, 2, and 3, and actual operation under assured delivery of firm contracts, the device is buttressed by the ability of the Administrator to discover actual resource operation at any time under either assured delivery or allocation procedures. For firm contracts, initial review will include consideration of specified resources proposed for sale and transmission over the Intertie.

Because BPA has elected to use the device of presumption, and not require precertification for the reasons stated above, BPA has not used the procedures for predetermination suggested by NMFS, which included a 30-day comment and consultation period for fish and wildlife agencies and Indian tribes and an annual report to demonstrate continuing compliance. (Evans, NMFS, letter dated 8/13/84, p. 3.) Similarly,

BPA is not making a predetermination, as requested by ICP, that the 14 hydroprojects and 3 thermal projects submitted by Idaho Power Company would not decrease the effectiveness of BPA's Fish and Wildlife Program, increase the need for additional expenditures to protect, mitigate, or enhance fish and wildlife, or otherwise interfere with the obligations of the Administrator to protect, mitigate, and enhance fish and wildlife. (Barclay, IPC, letter dated 8/13/84, p. 17, Appendix A.)

Issue #3: Summary of Comments

PNUCC asks that BPA assure at least minimum due process in making the determinations called for in the proposed Policy. (Hardy, PNUCC, letter dated 8/13/84, pp. 6-7.) PNUCC requests an informal adjudicatory proceeding under 5 U.S.C. §558(c) with written decision, based on the record and subject to review on the arbitrary and capricious standard.

Evaluation of Comments

Existing resources are covered by the presumption the Policy retains that their operation does not adversely impact fish and wildlife resources. The Policy is now clear that those resources are also presumed to be operating in compliance with applicable licenses and laws. Any challenge to this latter presumption must be brought before the applicable governmental entity. Any challenge to the former presumption must be brought to the Administrator, in writing, with notice to the owner or operator of the resource and responsible governmental agencies. BPA

also will accept public comment. After an opportunity to be heard, BPA will make a determination in writing.

PNUCC argues for an adjudicatory hearing under 5 U.S.C. §558(C), characterizing the granting of Intertie access as equivalent to the grant of a license. Section 558(c) provides that when a license is applied for, an agency will set the matter for hearing conducted in accord with sections 556 and 557 of the Administrative Procedures Act (APA) or other applicable law. Final actions by the Administrator are not subject to the hearing requirements of sections 556 and 557 of the APA. (*See*, Northwest Power Act, section 9 (e)(2).) No other law requires adjudicatory hearings in this matter. Use of the Federal share of the Intertie is handled as a matter of disposal of Federal property. (*See*, the above section on BPA's Exercise of Authority.) Such disposal are not subject to the same due process standard as the granting of licenses. An adjudicatory hearing is not required.

Decision

If any challenge is raised concerning the effects of the operation of an energy resource on BPA fish and wildlife efforts, in appropriate cases BPA will provide resource owners and operators, interested persons and the public with an opportunity to be heard regarding that effect. The challenge shall be made in writing. The determination shall be put in writing. BPA will develop more detailed procedures through notice and comment during the pendency of the Near Term Policy.

5. Consistency and the "Off-Site" Mitigation Provision

Issue #1: Summary of Comments

In draft Policy section 6(c)(2), now section 7(e)(2) of the Policy, BPA provides that the owner or operator of a resources the operation of which adversely affects the fish and wildlife resources in a manner described in section II.C.(3)(c), may make expenditures or take other actions offsite to offset the adverse effect. NMFS and NWF object to the provision on the grounds that it may permit offset expenditures or hatchery compensation. (Evans, NMFS, letter dated 8/13/84, p. 1; Thatcher, NWF, letter dated 8/13/184 [sic], p. 6; Thatcher, NWF, TR 281-282.) NMFS and CRITFC fear it might allow actions not consistent with the Council's Program (Bodi, NMFS, TR 292; Lothrop, CRITFC, TR 296), and CRITFC is concerned that such mitigation be consistent with the legal rights of appropriate Indian tribes. (Wapato, CRITFC, letter dated 8/13/84, p. 1.) Both NWF and NPPC propose the section be deleted, the Council averring that it would allow project operators and owners of existing resources to undermine or avoid compliance with the Council's Fish and Wildlife Program. (Thatcher, NWF, letter dated 8/13/84, p. [sic: no number in original]; Colbo, NPPC, letter dated 8/11/84, pp. 2-3; attachment 2, p. 3.)

Evaluation of Comments

CRITFC asserts that implementation of this section should not permit a course of action that conflicts with the Council's Fish and Wildlife Program. (Wapato,

CRITFC, letter dated 8/13/84, p. 1; Lothrop, CRITFC, TR 296.) NMFS interprets the section to permit "offset expenditures" in lieu of compliance. (Evans, NMFS, letter dated 8/13/84, p. 1.) NWF asserts that the section, as written, should be dropped for fear that it provides for payment of hatchery compensation in lieu of protection, mitigation, or enhancement at a particular project. (Thatcher, NWF, letter dated 8/13/84, p. 6.) The Northwest Power Planning Council also proposes that the section be deleted. (Colbo, NPPC, letter dated 8/11/84, p. 2 ; attachment 2, p. 3.)

BPA had intended, when it is not legally or practically possible for the owner or operator to modify the operation of the resource to assure that it will not have an adverse effect, to negotiate an agreement to undertake "off-site enhancement" in lieu of mitigation at site. This would be done in a manner comparable to that provided in section 4(h)(8)(a) of the Northwest Power Act. The NPPC alleges that the Policy would allow operators or owners to undermine or avoid compliance with their Fish and Wildlife Program, citing sections 106, 701, 703, and 704(g) of the Program. The NPPC also asserts that the BPA proposal represents a BPA attempt to make *de facto* amendments to the Program without a public process and Council approval. (Colbo, NPPC, letter dated 8/11/84, p. 2.)

BPA continues to believe that even when a resource is in compliance with licenses, permits and applicable law, but onsite mitigation for resource operations that adversely affects fish and wildlife is not possible, the owner or operator should take affirmative action to decrease the obligation of the Administrator to make

expenditures or take other actions to protect, mitigate, or enhance fish and wildlife. NWF has urged that BPA seek ways to assure the Council that the Council's Program will guide BPA in its actions with respect to fish and wildlife. (Thatcher, NWF, letter dated 8/13/84, pp. 2-4.) BPA has no intent to unilaterally amend the Council's Fish and Wildlife Program, nor to undermine Sections 106, 701, 703, 704(g) or any other sections of the Council's Program. BPA believes the Council's Program is a comprehensive remedial program for fish and wildlife resources in the Pacific Northwest.

Decision

BPA has included an amended section 7(e)(2) in the Policy as adopted, to provide that expenditures or other actions agreed to by the owner or operator of the resource must not be inconsistent with the Council's Fish and Wildlife Program. The "not inconsistent" standard was selected because it is unlikely that the Council's Program, or any program, could anticipate and define all applicable off-site mitigation measures for existing resources that are operated in compliance with licenses, permits and other applicable law, the operation of which the Administrator might determine would adversely affect fish and wildlife resources. In such circumstances a consistency standard would be meaningless, and arguably might excuse the owner or operator of responsibility for mitigative expenditures or actions.

6. Consistency With Tribal Rights

Issue #1: Summary of Comments

Evergreen Legal Service (ELS) has expressed concern that the Policy adequately protect treaty reserved fish and wildlife resources from developments inconsistent with the Northwest Power Act and Plan, particularly with the statements in Appendix E thereof related to treaty rights. (Thaler, ELS, letters dated 7/29/83 and 7/27/84.) The CRITFC argues that Section (6)(c)(2) "mitigation" must be consistent with the legal rights of the appropriate Indian tribes. (Wapato, CRITFC, letter dated 8/13/84, p. 1.)

Evaluation of Comments

It is FERC's role to make the provisions of Appendix E directly applicable to resource development. BPA recognizes that Indian treaties are part of the supreme law of the land, and as such are among the duties imposed upon BPA. (See, above discussion on Authority of Bonneville Power Administrator.) These rights, however, do not depend for their existence upon special recognition in this Policy.

Decision

BPA has reasonably concluded that it should not add a provision to the Policy that Appendix E is applicable law. However, BPA notes that section 10(h) of the Northwest Power Act contains a savings clause with respect to treaty rights.

7. Relationship of Intertie Access Policy to the Water Budget

Issue #1: Summary of Comments

IPC has raised a number of questions respecting the Fish and Wildlife Provisions in the draft Intertie Access Policy. Central to their concern is inquiry respecting the meaning of phrases used in the introductory material: "BPA's Fish and Wildlife Program" and "the Administrator's Fish and Wildlife Program." In addition to other issues addressed elsewhere in this Record of Decision, IPC particularly is concerned what the provisions of the Policy not interfere with action BPA might take to compensate IPC in kind for energy lost as a result of water releases from Brownlee Reservoir to satisfy the Water Budget.

Evaluation of Comments

BPA agrees that the phrases "BPA Fish and Wildlife Program" and "the Administrator's Fish and Wildlife Program" are importune; they should have read instead "the Administrator's efforts on behalf of fish and wildlife." That introductory material, however, has been edited and shortened in the interim Near Term Policy now promulgated and neither phrase appears. Accordingly, those concerns of IPC which were premised on BPA having adopted either the Council's Program or some other program are unfounded.

Under the terms of the NPPC's Fish and Wildlife Program, IPC participation in the Water Budget is discretionary, the Council having acknowledged the IPC position that IPC through its settlement agreement and FERC license has compensated for all

adverse effects of its projects on fish. The NPPC calls upon BPA to replace the loss in kind if IPC experiences a power loss as a result of participating in the Water Budget, and it is determined that the need for water from Brownlee Reservoir is not attributable to the development and operation of IPC's Hells Canyon Complex.

IPC is correct in stating that BPA has indicated that it will negotiate a contract to replace in kind the generation ICP might lose as a result of participating in the Water Budget. IPC is not correct, however, in stating that "BPA has apparently made a determination that "[sic] . . . the need for water from Brownlee Reservoir is not attributable to the development and operation of Idaho Power's Hells Canyon Complex . . .". (Barclay, IPC, letter dated 8/13/84, p. 11.) BPA stated in its letter of February 6, 1984, transmitting a draft interim contract to IPC which might have governed the operating year 1983-84, that such a determination prospectively would necessarily await completion of BPA's Policy on compensation for power losses and other costs incurred if other Federal agencies impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of a project. BPA's Compensation Policy will cover BPA's obligations under section 4(h)(11)(A), where another Federal agency has imposed such measures, and not BPA's undertakings pursuant to section 4(h)(10)(A) to compensate IPC in kind. However, after adoption of the Compensation Policy, the standards BPA will apply in determining the extent of the Administrator's obligation are expected to be similar.

BPA extended a draft interim contract prior to operating year 1982-83, and this last year, pending completion of Compensation Policy development, in order that IPC not withhold participation in the Water Budget if the need arose. In fact, in neither operating years 1982-83 or 1983-84 has such participation been required. Accordingly, no contract has been executed by BPA and IPC.

IPC now posits that under the terms of the Intertie Access Policy, BPA might condition Intertie access on IPC participation in the Water Budget without compensation from BPA, and suggests that if that is the case, IPC would consider withdrawing from Water Budget participation. (Barclay, IPC, letter dated 8/13/84, pp. 9-12.) With respect to BPA's repayment in kind to IPC for Water Budget participation, BPA is exercising authorities, other than expenditure authorities, under section 4(h)(10)(A) of the Northwest Power Act. The manner and cost of repayment is subject to BPA's determination that the need for water from Brownlee is not attributable to the development and operation of IPC's Hells Canyon Complex, and pursuant to standards comparable to those established under the Compensation Policy, BPA might conclude that not all power lost by IPC in some future year would be compensable. However, such a conclusion would be reached independently of the Intertie Access Policy.

BPA does not consider the Fish and Wildlife Provisions in its Intertie Access Policy as a means to avoid other obligations it may already have acknowledged to protect, mitigate, and enhance fish and wildlife. The Policy as written speaks to instances where scheduling of energy will result in the operation

of resources, under either a firm contract or an allocation, which adversely affects the Administrator's efforts on behalf of fish and wildlife. IPC may determine the extent and duration of their Water Budget participation, and whether Brownlee is run to serve regional or extraregional load. Should IPC seek an allocation to transmit energy from Brownlee over the Intertie, BPA would likely examine that action, if at all, after the fact and pursuant to a request from the Administrator that IPC disclose what resource had been run at a particular hour. Should the Brownlee operation be challenged, it would be challenged in terms of how its operation adversely affected the Administrator's efforts on behalf of fish and wildlife. BPA's control of access to the Intertie should not influence the amount of water made available by IPC for use in meeting the Water Budget. As a result repayment is not conditioned by access to the Intertie.

Decision

Repayment to IPC for participation in the Water Budget and implementation of fish and wildlife provisions to the Near Term Intertie Access Policy are not inconsistent.

8. Resources Other Than Existing Resources

Issue #1: Summary of Comments

Most of the comment BPA received concerning fish and wildlife during the early stages of Intertie Access Policy development had to do with the relationship of the Policy to new resource development. Fish and wildlife agencies and advocates were primarily

concerned about proposed new small hydroelectric developments, literally hundreds (by one account, over 1000) of which are under consideration by FERC at the present time. (Thatcher, NWF, comments dated 3/14/84, pp. 6-9; Wapato, CRITFC, letter dated 3/16/84, p. 1.) The NPPC was concerned that FERC might not deal with those proposals in a manner consistent with the Council's Energy Plan, and collaterally with its Fish and Wildlife Program. (Colbo, NPPC, letter dated 3/16/84, pp. 1-2.) Fish and wildlife interests and Indian tribes saw conditioning Intertie access on consistency with the Council's Plan and Program as a means to make sure that in the licensing process so-called "dirty" hydro proposals would be seen as less readily marketable than other resources. (Wapato, CRITFC, letter dated 3/16/84, pp. 1-2.)

The NPPC alleges that BPA is acting inconsistently with its Fish and Wildlife Program in treating new resources more strictly than existing resources. (Colbo, NPPC, letter dated 8/13/84, p. 2.) IPC believes that this portion of the provision runs counter not only to the Northwest Power Act, but also to PURPA. (Barclay, IPC, letter dated 8/13/84, p. 14.) WWP believes BPA should delete provisions on fish and wildlife, and participate in licensing of new resources to assure their compliance with the Council's fish and wildlife provisions. (Bryan, WWP, letter dated 8/9/84, p. 1.) On the other hand, Seattle City Light urges that Intertie access for new resources should be conditioned on the Northwest Power Act and the Council's Fish and Wildlife Program. (Saven, SCL, letter dated 8/13/84, p. 3.) The NCAC believes that requiring utilities to be consistent with Council's Plan is the only way to insure that utilities will not develop inconsistent resources (unless required by a regulatory body, i.e.,

PURPA) and free up existing resources for resale. (Stearns, NCAC, letter dated 8/9/84, p. 2.)

NWF also is concerned with what they call the laundering problem, that is, that new resources that might adversely affect fish and wildlife not be constructed to serve regional loads while other existing resources are sold on the Intertie. (Thatcher, NWF, TR 266.) They indicate that any anti-laundering provision should apply to resources that do not meet the definition of "existing resources". (Thatcher, NWF, letter dated 8/10/84, p 2.) This issue is also discussed in the section titled Existing Resources. ELS calls for BPA to make explicit that Appendix E of the Council's Energy Plan is "applicable law." (Thaler, ELS, letter dated 7/27/84, p. 1.) The NWF concedes, however, that the lack of access for new resources appears to eliminate NWF's concern with respect to consistency of BPA efforts with the Council's Plan. (Thatcher, NWF, TR 286.)

The issue on consistency with the Council's Energy Plan was much diluted when BPA determined to develop an interim Near Term Intertie Access Policy to be implemented on a 6-month basis, preparatory to concluding on a Near Term Intertie Access Policy applicable for the 18 months thereafter, and to separately develop a Long Term Intertie Access Policy. The draft Near Term Intertie Access Policy, however, defined existing resources as including not only those operating, but also those contemplated within existing planning documents. To address partially the concerns evidenced it also provided in subsection 6(a) prospective guidance that BPA would not provide Intertie access in the future to resources the operation of which

would adversely affect the Administrator's efforts on behalf of fish and wildlife.

Evaluation of Comments

NPPC believes that BPA establishes an inappropriate dual standard, treating new resources more strictly than existing resources. They allege this is inconsistent with the Council's Fish and Wildlife Program. (Colbo, NPPC, letter dated 8/13/84, p. 2.) BPA has failed to find in the Program any guarantee that new resources in the Pacific Northwest should not be held to a stricter standard than old. Indeed, it would appear that those constructed after the passage of the Northwest Power Act, either by application of section 4(h)(11)(A) or subsection 4(e)(2) might be held to a higher standard. BPA believes this to have been the intent of Congress in passing the Northwest Power Act, and would be dismayed if previous mistakes respecting hydro development and fish, were repeated in the future under the Council's plan.

BPA, again in the Policy as adopted, has provided guidance that any resource not covered by the Near Term Policy will not be accorded access if its construction or operation will adversely affect the Administrator's efforts on behalf of fish and wildlife. BPA recognizes that providing for unequivocal denial of Intertie access for resources that adversely affect the Administrator's efforts on behalf of fish and wildlife is a stricter standard than that accorded existing resources. Announcement of the standard at this point puts not only utilities and resource developers, but also applicable regulatory authorities on notice that the marketability of a prospective resource may be impaired if the construction or

operation of that resource will interfere with the Administrator's efforts on behalf of fish and wildlife. It is, after all, in the interest of all in the Region that BPA's expenditures and other actions on behalf of fish and wildlife achieve optimum effectiveness. The NWF advocated including a clear statement that no access will be assured for new generating resources. (Thatcher, NWF, TR 277.) BPA now has modified that definition of Existing Pacific Northwest Resources to include only resources operational on the effective date of the Policy.

WWP has suggested that BPA should instead concentrate its efforts on assuring compliance with the Regional Council's fish and wildlife provisions through participation in the licensing of new resources. (Bryan, WWP, letter dated 8/9/84, p. 1.) BPA assumes that FERC, in the licensing of new resources, will take the Council's Fish and Wildlife Program into account to the fullest extent practicable, as it is required to do under the terms of section 4(h)(11)(A) of the Northwest Power Act, and that the Council will be its own advocate for consistency. However, to the extent that BPA has relevant information on the effect of a proposed resource on fish and wildlife, the need for such a resource, or the marketability of such a resource, BPA will consider participating in FERC proceedings.

Both NCAC and NWF are concerned that provision of Intertie Access not offer a vehicle whereby a scheduling utility may displace and sell to California benign resources not harmful to fish and wildlife after developing new resources that adversely affect fish and wildlife, or are otherwise not in compliance with the Council's Energy Plan. (Stearns, NCAC, letter dated

8/9/84, p. 2; Thatcher, NWF, letter dated 8/10/84, p. 2.) (See, Section D. 4., Enforcement.) BPA concedes the possibility that this may occur, especially in the case of hourly allocation of the Intertie under Conditions 1, 2, and 3, when BPA will not have advance knowledge of which resources a scheduling utility intends to run for transmission to the Southwest. BPA has included in its Near Term Intertie Access Policy a provision whereby it may discover which resources are being used to generate power flowing to the Intertie. However, BPA does not believe that its authorities go to denying access to a scheduling utility for power from all of its resources, if FERC has allowed one to be constructed that is not in compliance with the Council's Energy Plan. BPA's role is not to reconcile FERC's licensing and Council's Plan. However, if that new resource would also adversely affect the Administrator's efforts on behalf of fish and wildlife, prospectively it may be denied Intertie access by BPA.

Appendix E of the Council's Energy Plan, in the main, is drawn from Section 1200 of the Council's Fish and Wildlife Program. It is a list of terms and conditions designed to assure that fish and wildlife considerations are taken into account in the development of new hydroelectric resources. Whether that list has the status of applicable law is beyond the scope of this policy, or this evaluation. FERC has authority to make those terms and conditions applicable to new hydroelectric development.

Decision

BPA believes that it is reasonable and appropriate to include within the interim Near Term Intertie Access

Policy notice of its intent to deny access to the Intertie to resources not in existence on the effective date of this Policy which would adversely affect the Administrator's efforts on behalf of fish and wildlife. For this decision, BPA relies upon the same authorities and rationale set forth in the discussions on BPA Authority and BPA Exercise of Its Authority above.

IV. Assured Delivery and Formula Allocation Methods

A. Available Capacity

1. Net Scheduling

Issue #1: Summary of Comments

BPA's proposal defined Intertie capacity as the capacity of the Intertie facilities controlled by BPA increased by the amount of obligation energy deliveries under capacity and capacity/exchange contracts with the Southwest. LADWP called this an artificial increase of Intertie capacity. (Cotton, LADWP, letter of 8/13/84, p. 5)

Evaluation of Comments

BPA's intent was to define Intertie capacity in such a way as to include all opportunities for contractual delivery over such facilities, including amounts that contractually flow from south to north as do obligation energy deliveries. There is an ongoing dispute between BPA and California utilities regarding the delivery terms for obligation energy pursuant to existing contracts.

LADWP's objection was based on two grounds: first, LADWP disputes BPA's contract right to require obligation energy to be delivered at the border points of delivery; and second, LADWP disapproves of the practice of net scheduling of the commercial transactions using transmission facilities. (Cotton, LADWP, letter 8/13/84, p. 5.)

Net scheduling is the practice of netting the sum of all contractual schedules coming into a control area against the sum of all contractual schedules going from that control area to another. This net schedule must not exceed the rated scheduling capacity of transmission facilities in service between the two control areas. The Western Systems Coordinating Council and the Northwest Power Pool both subscribe to this standard indicating that it is within the concept of prudent utility practice and, further, it is included in the recommended minimum operating reliability criteria of these organizations. This practice achieves the most cost-effective use of transmission facilities. If net scheduling were not used, the total of contractual transactions that could be accommodated using the transmission facilities would be less.

Decision

The definition of Intertie capacity subject to allocation under this policy will reflect the prudent utility practice of net scheduling the interchange between control areas. The definition, however, has been modified to indicate that Intertie capacity may be decreased by loop flow, outages, and other factors that reduce transmission capacity from north to south.

2. Relationship to PGE Ownership

Issue #1: Summary of Comments

PGE requested that BPA confirm that (1) BPA's proposed policy applies only to BPA's ownership and rights in the Intertie, and (2) that PGE will be entitled to access onto BPA's Intertie share under BPA's policy

in the same manner as other Northwest utilities (Bredemeier, PGE, letter dated 8/13/84, p. 1.). WPSC recommended that BPA make a final settlement as to the access rights of owning utilities before the Policy is finalized, and that each utility should have the right to control its share. (Jacquot, WPSC, letter dated 8/8/84, p. 1.)

Evaluation of Comments

As explained at the Public Comment Forums on July 24 and 25, 1984, BPA's Intertie Access Policy applies only to BPA's Intertie ownership and rights of use. All written materials concerning the Policy have also explicitly stated this restricted application.

Under the PGE Intertie Agreement (BPA Contract No. 14-03-55063) BPA does have the right to use PGE's AC-Intertie capacity for transmission whenever PGE is not using such capacity for itself or others. PGE's use clearly has precedence. However, when PGE is not using its capacity, BPA will be applying the Intertie Access Policy to schedules which may flow over part of PGE's capacity.

When BPA issued its Notice of Intent to Develop an Intertie Access Policy, it included a statement that PGE's Intertie rights are currently in dispute and are being negotiated. There are no other negotiations concerning disputed Intertie rights underway with any other utility with an Intertie ownership right. Negotiations with PGE may be concluded and an agreement executed after BPA's Near Term Intertie Access Policy goes into effect. Such agreement will not in any way change BPA's policy; however, in settling disputed Intertie rights, this agreement could slightly

effect the amount of Intertie capacity available for BPA's use.

PGE will be entitled to access to BPA's Intertie capacity on the same basis as other Pacific Northwest utilities after it makes full use of its own AC-Intertie capacity and its existing contract rights to utilize BPA's Intertie capacity.

Decision

No change in the Policy is required to confirm that it only applies to BPA's ownership and rights, and that PGE will be entitled to access on BPA's share of the Intertie after PGE makes full use of its own AC Intertie capacity.

B. Assured Delivery for Firm Contracts

1. Criteria

Introduction

In addition to meeting the conditions for Intertie Access that a firm contract must satisfy in order to be assured delivery, the proposed Policy listed a number of qualifying factors: (1) term of not less than 1 year; (2) take a pay obligation; (3) delivery of power not subject to displacement by the purchaser; (4) provision for sale of resources in excess of the Pacific Northwest supplier's other firm obligations, determined pursuant to the Coordination Agreement or similar planning criteria; and (5) obligation energy delivery consistent with BPA practices. In addition, a general statement was included concerning "firm hourly schedules" as being characteristic of a firm power sale. BPA's intent

was to avoid providing assured delivery for a contract that was merely an advanced arrangement to sell nonfirm power.

Some commenters were in favor of BPA's intent to exclude nonfirm sales transactions from assured access. (Bredemeier, PGE, letter dated 8/13/84, p. 2; Boucher, PP&L, letter dated 8/13/84, p. 1; Schultz, ICP, letter dated 8/10/84, pp. 6-7.) Western also suggested what they believe is a truer test of firmness to recognize capability contracts. (Coleman, WAPA, letter dated 8/13/84, p. 4.)

BPA recognized that the question of assured delivery for firm contracts was one of the most troublesome issues in the proposal and scheduled an additional public meeting to discuss the issue. (Jones, BPA, TR 212.) The ICP realized that the problem was to make sure that the sales were truly firm. The ICP stated that there was [sic] two approaches to eligibility: (1) test the nature of the contract, or (2) test the ability of the supplying utility to provide firm power. They strongly recommend the first approach. (Schultz, ICP, letter dated 8/10/84, p. 6-7.)

The proposed Intertie Access Policy determined eligibility by testing the nature of the contract. Even in the proposal, however, a utility still had to have a monthly average firm surplus to qualify for assured delivery. BPA was unable to develop contract criteria that would not unduly burden innovative sales and still provide the assurance that the firm sale would not simply be an advanced arrangement to sell nonfirm.

BPA then considered assured deliveries up to the amount of an [sic] utility's annual average firm surplus whether or not the utility had a firm sales contract. However, such a policy would have unduly advantaged

utilities with firm surplus over utilities that depend on the Intertie for nonfirm sales.

Finally, BPA arrived at a compromise that would provide assured delivery up to the amount of a utility's average annual firm surplus providing the utility had a firm sales contract. By limiting the amount that would be provided assured delivery, BPA was able to reduce the criteria to a minimum. The compromise assumed some shaping into the months of August through December.

BPA intends to watch the operation of the assured delivery feature of the contract carefully. Comments will be solicited during the next 6 months and the issue will be revisited before the final Near Term Intertie Access Policy is adopted.

Issue #1: Summary of Comments

Many comments addressed the question of the term of a firm contract. The ICP suggested as an alternative that any contract whose term is at least one year and is effected on an unconditional basis prior to any operating year, should qualify as "firm" for that year. (Schultz, ICP, letter dated 8/10/84, p. 7) Other comments were that the qualifying factors should not preclude capacity sales or exchanges, which may only require seasonal deliveries. (Bryan, WWP, letter dated 8/9/84, p. 1; O'Banion, SMUD, letter dated 8/13/84, pp. 3 and 5; Saven, SCL, letter dated 8/13/84, p. 2; Pugh, NCPPA, letter dated 8/13/84, p. 3.) Arrangements for periods of less than a year may be firm to some utilities. (Coleman, WAPA, letter dated 8/13/84, p. 3; Saven, SCL, letter dated 8/13/84, p. 2; Niggli, SDG&E, letter dated 8/13/84, p. 2.) SCE commented

that the 1-year term requirement would appear to have disqualified for assured delivery a shorter term sale such as the Olympic Clean Air sale offered by BPA this year and rejected by all California utilities. (Myers, SCE, letter dated 8/13/84, p. 17.) SMUD indicated that bilateral firm arrangements with BPA and other Pacific Northwest utilities should not be foreclosed. (O'Banion, SMUD, letter dated 8/10/84, p. 4.)

Evaluation of Comments

Comments revealed that the meaning of the word "firm" in the utility industry is variable. Comments indicated that term of the contract may also be less important than provisions for delivery during parts of the year. BPA agrees that a requirement for a minimum 1-year term is not a good way to distinguish firm from nonfirm arrangements, since nonfirm sales arrangements may have terms in excess of 1 year.

Decision

Term of contract will not be included as a factor for qualifying firm contracts. This will allow flexibility for BPA to consider arrangements that utilities feel firm even though the term is less than 1 year. This also will avoid the possibility that a 1 year term could be specified while deliveries are restricted in such a way that the transaction is actually short term. BPA intends to avoid setting factors that could be confusingly represented in an agreement, making the process of qualification onerous and uncertain.

Issue #2: Summary of Comments

Some utilities felt that a take or pay criterion for firm contracts should not be required. Western claims this could preclude flexible negotiation of arrangements which are not totally take or pay. (Coleman, WAPA, letter dated 8/13/84, p. 3.) SDG&E believes take or pay provisions are not desirable because the supplier generally incurs no variable costs in event of curtailment or displacement. (Niggli, SDG&E, letter dated 8/13/84, p. 2.) However, PP&L said that BPA's criteria must recognize minimum take or pay provisions. (Boucher, PP&L, letter dated 8/13/84, p. 2.)

Evaluation of Comments

BPA's intent in including the take or pay requirement was to avoid giving the advantage of assured delivery for an advance arrangement to sell nonfirm power. The mutual obligation to buy and sell is critical to this factor. BPA feels this must remain as a criterion. The comments by Western (Coleman, WAPA, letter dated 8/13/84, p. 3) and SDG&E (Niggli, SDG&E, letter dated 8/13/84, p. 2) state the buyer's preference for flexibility. They do not argue against the fairness of reserving assured delivery for sales with an [sic] mutual obligation, which is BPA's intent. The proposal was clarified by BPA in the August 24 Public Comment Forum. (Griffin, BPA, TR 104.) Assured delivery may be granted for schedules under a firm contract *to the extent that* such schedules meet the criteria, which should satisfy some concerns. The contract may provide for nonfirm sales in addition to some amount that is firm. This does not disqualify the

schedules for delivery of firm power under that contract. PP&L recognized the significance of a minimum take or pay provision in its comment, as cited above.

Decision

Assured delivery may be provided for a contract to the extent the contract provides that the amount of power to be delivered, the price, and the terms for delivery are specified in a manner that assures that the contract is delivering firm power and is not merely an advance arrangement to sell nonfirm energy. Sales that do not qualify for assured deliveries must be made within the utility's Condition 2, or Condition 3.

Issue #3: Summary of Comments

BPA proposed that a contract would only qualify for assured delivery to the extent that the purchaser could not displace it with other power. Several commenters felt some displacement should not disqualify a contract for assured delivery. Interruptibility based on economic considerations, such as utilization of California hydro, or to meet minimum generation requirements are possible features of firm contracts. NP&P also suggested that only displacement with "nonfirm" power be prohibited. (Canon, ICNU, letter dated 8/13/84, p. 2; Boner, NP&P, letter dated 8/7/84, p. 2.) SDG&E felt that BPA's prohibition of displacement ignored BPA's own rate practices and standard utility practices. (Niggli, SDG&E, letter dated 8/13/84, p. 2.)

Evaluation of Comments

If the purchaser is allowed complete discretion to substitute other purchasers and not compensate the original "firm" seller, BPA does not feel that the original sales contract should be classified as firm. This instead becomes an advance arrangement to buy or sell nonfirm energy when it is available. This also is related to the take or pay obligation discussed above. The provision is not intended to prevent economic displacement by the supplier, as some commenters suggested. (Canon, ICNU, letter dated 8/13/84, p. 2; Boner, NP&P, letter dated 8/7/84, p. 2.) BPA, as a supplier, will take advantage of economic displacement, as do other suppliers. However, it must be noted that economic displacement of a resource usually is the right of the seller rather than a right of the buyer. However, the seller may still be committed to deliver firm energy to the buyer at a stated price. If the buyer has the right to displace the contract with lower priced nonfirm energy when it is available, then the contract may simply be an advanced arrangement to make nonfirm sales. In that case it would not be equitable to assure delivery of that contract ahead of other utilities selling nonfirm energy as economy energy.

Decision

BPA has removed displacement as an absolute factor required to qualify for assured delivery. However, BPA will consider the extent to which a contract provides the buyer with the right to displace purchases under the contract with nonfirm energy.

Issue #4: Summary of Comments

The proposed policy provided that the surplus to be sold be determined as indicated in the Coordination Agreement. The IPC was concerned that this should not be interpreted to require conformance with Coordination Agreement methodology by nonparties. (Barclay, IPC, letter dated 8/13/84, p. 1.)

Evaluation of Comments

At the August 27 public comment forum, BPA requested comment on other means for determining a utility's firm surplus, for use as an upper limit on assured delivery. BPA specifically requested comments on the suggestion that BPA could provide assured delivery for an amount of power up to a utilities average annual firm surplus provided the utility had made a sale of firm power over the Intertie. (Jones, BPA, TR 237.) There was general consensus that it was not appropriate to use data from the Coordination Agreement to determine the average annual firm surplus. (Smith, Cowlitz, TR 243; Nelson, SCL, TR 251; Durocher, DSI, TR 252.) There was support for using PNUCC long term planning documents. (Durocher, DSI, TR 252; Nelson, SCL, TR 253.)

BPA recognizes that it is the practice of many utilities with firm surplus to shape the surplus into the period of the year for August through December. Basing assured delivery on average annual firm surplus would deprive utilities of the advantages from that practice. Therefore, BPA considered increasing the amount of the firm surplus that could be provided assured delivery in those months. (Jones, BPA, TR 242.) This had the additional advantage that it

facilitated the sale of firm surplus during the time when it was of most value to California utilities. Further, it tended to make more Intertie capacity available for nonfirm energy sales during the remainder of the year.

Decision

Assured delivery will be based on the Average Firm Surplus listed in of [sic] Exhibit B of the Policy. This exhibit is developed from PNUCC planning data and BPA's load forecast. During the months of August through December, the Average Firm Surplus will be increased by a factor of 1.8, except that during the months of November and December no increase will be allowed when the Exportable Agreement is in effect.

Issue #5: Summary of Comments

Western pointed out that firm hourly schedules do not apply only to sale of firm power. (Coleman, WAPA, letter dated 8/13/84, p. 4.)

Evaluation of Comments

BPA agrees with Western's comment that a nonfirm sale can be "firm" on a given hour. BPA is not proposing to use its discussion about hourly schedules as a criterion to determine whether a contract qualifies as firm.

Decision

Firm hourly schedule will not be used as a criterion.

2. Return of Obligation Energy

Issue #1: Summary of Comments

The proposed Policy stated that replacement of firm capacity or deliveries of exchange energy under new firm sales contracts were to be delivered to the point of BPA's interconnection on BPA's system either at the California-Oregon border (COB) or the Nevada-Oregon border (NOB). A few commenters believe that to require such deliveries to COB-NOB is unacceptable and not justified. (Bryan, WWP, letter dated 8/9/84, p. 2; Myers, SCE, letter dated 8/13/84, p. 22; Cotton, LADWP, letter dated 8/13/84, p. 5; Schultz, ICP, letter dated 8/10/84, p. 7; Niggli, SDG&E, letter dated 8/13/84, p. 2.)

WWP believes that such a requirement is a charge for double wheeling (Bryan, WWP, letter dated 8/9/84, p. 2.) Some parties claim that BPA is assessing a charge without rendering a service or charging for transmission losses that are not actual losses. (Myers, SCE, letter dated 8/13/84, p. 22; Niggli, letter dated 8/13/84, p. 2.)

Evaluation of Comments

BPA's intent in requiring new contracts to replace firm capacity or deliver exchange energy at COB-NOB was to avoid providing assured delivery for a contract that was merely an advance arrangement for the sale of nonfirm energy. However, this issue may not be pertinent at this time, since it appears that capacity/energy exchange contracts may not be the highest and best use of an Intertie that is fully loaded with surplus power and energy sales. BPA will study

and encourage further comment on this issue during the next 6 months.

Decision

BPA will not require, as a condition of Intertie access, that COB/NOB be used as the point of delivery for returning obligation energy. BPA will, however, continue to specify its points of delivery in accordance with its contract rights.

3. Wheeling Charges

Issue #1: Summary of Comments

In the proposed Near Term Intertie Access Policy, BPA did not specifically address wheeling charges over the Intertie. During the hearing, PP&L requested clarification as to BPA's intent in the 1985 rate case as to modification of BPA's existing wheeling rate schedule to recognize deliveries which have been allocated space on the Intertie. (Boucher, PP&L, TR 134.) Specifically, PP&L inquired whether BPA will implement a capacity charge on allocations for assured deliveries. A similar question was posed during the hearing by LADWP as to whether a wheeling charge would be implemented for a Pacific Northwest utility receiving an allocation of the Intertie, but that does not physically wheel. (Whitney, LADWP, TR 207.)

PP&L also urged BPA to implement a cost-based firm capacity wheeling rate for firm Intertie capacity allocations to recognize the superior class of service associated with firm access. (Boucher, PP&L, letter dated 8/13/84, p. 2.) A similar comment was made by the ICP. The ICP said that a demand only rate should

be implemented for firm transactions to remove some of the incentives for utilities to get a priority for what are really nonfirm energy deliveries. (Schultz, ICP, letter dated 8/10/84, p. 7.)

The MPSC commented that some version of marginal cost pricing is most appropriate for transmission services. (Driscoll, MPSC, letter dated 8/10/84, p. 4.) The DSIs proposed that the charges for Intertie use be based on all costs, including estimated revenue loss associated with wheeling for non-Federal use of the Intertie capacity. (Wilcox, DSI, letter dated 8/19/83, p. 2, attached to letter dated 8/13/84.)

Evaluation of Comments

All comments received dealt with rate adjustments for wheeling service on the Intertie. BPA responded in the public comment forums that the present Intertie South (IS-83) rate schedule would apply, which currently only has an energy charge, and that any future rate adjustments would be subject to a separate 7(i) rate proceeding. Any adjusted wheeling charges on the Intertie would be for post July 1985. (Jones, BPA, TR 135, TR 207.)

Decision

The current rate schedule, IS-83, will be utilized for all deliveries on the Intertie, except for transactions under the Exportable Agreement, in which case the ET-2 rate schedule will apply. In adjusting wheeling charges for the Intertie, BPA will follow the other procedures specified in section 7(i) of the Northwest Power Act. That proceeding and rate determinations are separate from this policy proceeding.

BPA's initial rate proposal for 1984 (FEDERAL REGISTER, September 7, 1984), provides that the energy-based IS rate be retained. The proposed IS-85 rate is 2.34 mills/kWh. For assured delivery, BPA is proposing that the IS rate be utilized on a take-or-pay basis. The allocated energy which is entitled to assured delivery for wheeling over the Intertie will be utilized for billing purposes. BPA anticipates the new transmission rates will become effective on an interim basis on July 1, 1985.

C. Formula Sharing Method

1. Exportable Agreement Rights

Issue #1: Summary of Comments

The PGP recommended that the rights of parties to the Exportable Agreement be preserved by incorporation into the Intertie Access Policy. (Garman, PGP, letter dated 8/9/84, p. 3.)

Evaluation of Comments

The PGP's concerns were primarily related to their belief that the rights of Exportable Agreement parties should not be degraded. BPA recognizes its existing contractual obligations under the Exportable Agreement, described as Condition 1 under the Policy. When the Exportable Agreement is not in effect, and Condition 2 or 3 under the Policy are applicable, the rights of Exportable Agreement parties are not abridged.

Decision:

BPA's Near Term Intertie Access Policy is consistent with rights of Exportable Agreement parties.

2. Readjusting Allocations

Issue #2: Summary of Comments

Concern has been voiced that BPA not adjust allocations based on a scheduling utility's previous day(s) actual share of available scheduling capacity. At an informal operators' meeting on July 25, 1984, a BPA representative indicated that if a party received a larger share of available capacity on one day than it should have received based solely on the pro rata allocation methodology, such utility's allocation would be adjusted (reduced) on following day(s).

Evaluation of Comments

SCE argued that this was a clear example of trying to establish a Pacific Northwest price maintenance policy. (Myers, SCE, letter dated 8/13/84, p. 10.)

Decision

BPA will not adjust allocations based on use or actual market conditions. BPA's intent in proposing a reallocation based on sales was to increase the ease of administering the allocation process. However, on consideration of SCE's comment, BPA believes that such a practice would be widely misunderstood and

that its negative effects would outweigh any positive benefits.

3. Access for Extraregional Resources and Utilities

Issue #1: Summary of Comments

BPA's proposal provided Intertie access for extraregional resources or entities only to the extent that capacity would be available in excess of the declarations of Pacific Northwest utilities. BPA included a proposal that extraregional utilities could gain access by virtue of greater participation in coordinated planning and operation, which would benefit the Region. This option specifically was supported by the PGP and EWEB. (Garman, PGP, letter dated 8/9/84, p. 3; Parks, EWEB, letter dated 8/13/84, p. 2.)

Many parties agreed that the Pacific Northwest utilities should have priority to Intertie access. (Schultz, ICP, letter dated 8/10/84, p. 5; Jacquot, WPSC, letter dated 8/8/84, p. 2; Brawley, PPC, letter dated 8/13/84, p. 1; Bredemeier, PGE, letter dated 8/13/84, p. 2; Boucher, PP&L, letter dated 8/13/84, p. 3; Parks, EWEB, letter dated 8/13/84, p. 3; Garman, PGP, letter dated 8/13/84, p. 3; Wilcox, DSI, letter dated 8/19/84, p. 3; Wilcox, DSI, letter dated 8/15/84, p. 2, attachment 1, p. 5.)

SMUD and the NCPPA agree that Pacific Northwest utilities are entitled to priority access to Pacific Northwest transmission. They also supported efforts to accommodate B.C. Hydro and other extraregional power suppliers because their resources may be

important in the future. (O'Banion, SMUD, letter dated 8/10/84, p. 4; Pugh, NCPPA, letter dated 8/13/84, attachment, pp. 2-3.)

SCE and PG&E asserted that Pacific Northwest priority to Intertie capacity impermissibly excludes Canadian energy from access. (Myers, SCE, letter dated 8/13/84, pp. 11-12; Gardiner, PG&E, letter dated 8/10/84, p. 10.)

MPSC questioned whether, if Colstrip 3 and 4 are not Pacific Northwest regional resources, would they qualify for Intertie access as "Midwestern resources" under the Western-Basin transmission contract. (Jacquot, MPSC, letter dated 8/13/84, pp. 3-4.)

Evaluation of Comments

The comments regarding extraregional access fall into two categories: those directed to BPA's authority to exclude extraregional resources, and those directed to the reasonableness of the action from a policy view point. The comments directed to BPA's authority to exclude extraregional resources are discussed elsewhere in this Record of Decision.

The ICP agreed with BPA that the history of Intertie development and the coordination of planning and operation among the utilities of the Region justify the priority of access for such utilities ahead of extraregional entities. (Schultz, ICP, letter dated 8/13/84, p. 2.)

Pacific Northwest utilities are obligated to plan, construct, and operate the transmission system and resources of the Pacific Northwest as a coordinated system. Those Pacific Northwest utilities that are parties to the Coordination Agreement commit to the

coordinated operation of their resources as if they were part of a single utility. Extraregional utilities make no similar commitment, yet seek to rely on regional facilities including transmission.

These same extraregional utilities do not share the obligations incurred by BPA customers in their ultimate responsibility to pay all costs necessary to produce, transmit, and conserve resources to meet the Region's electric power requirements, including amortization on a current basis of the Federal investment in the FCRPS. This is a mechanism employed by Congress to assure that BPA's customers, and not the nation's taxpayers, underwrite the costs associated with the construction and operation of BPA's ownership in the Interties and related facilities. The benefits of the Federal transmission system in the Pacific Northwest, accordingly are intended primarily for utilities in the Pacific Northwest.

Congress called on BPA to construct Federal transmission facilities in the Region if they were required to serve the Region's needs to integrate recsources [sic] under the "one utility" planning concept, to integrate the Pacific Northwest and the Southwest through diversity and peak/exchange transactions, and to transmit the Region's surplus power and energy to other regions, particularly the Southwest.

Federal transmission facilities were constructed, on the basis of general Pacific Northwest utility consensus, in order to avoid the costly facility duplication that would result if all utilities in the Region were to construct their own facilities. If extraregional utilities were give [sic] access to these facilities in times of regional surplus it would result in

less capacity being available for regional utilities. In that case, the original purpose of the Federal facilities would be lost. Consequent detrimental effects would be felt by those regional utilities that might have originally build their own facilities, but instead relied on the cooperative planning and construction approach. Congress therefore authorized, but did not direct, that BPA afford transmission access to extraregional utilities.

The PGP supported the provision of Intertie access to extraregional resources in return for expanded participation in Pacific Northwest water and power planning. (Garman, PGP, letter dated 8/9/84, p. 2.) They went on to suggest that allocation could be related to historical use patterns. Further they stated that such agreements will provide opportunity for increased mutual benefit through more efficient and effective use of the Columbia River system.

BPA strongly believes that opportunities exist for extraregional utilities to participate more fully in regional planning and operations. With this expanded participation, extraregional utilities will have an interest in the Pacific Northwest power system beyond use as a temporary conduit to markets in the Southwest.

Starting with a meeting on July 5, 1984, BPA and B.C. Hydro have held detailed discussions regarding just such an arrangement. These discussions were significant and substantive and continued through August 31, 1984. On that date the discussions were discontinued through the mutual agreement of B.C. Hydro and BPA. These discussions were an attempt to provide increased usage of the Canadian treaty reservoirs in return for access to the Intertie in the

amount of 3,100,000 megawatt hours per year and an hourly declaration of 900 megawatts under Condition 2. The proposed access to the Intertie approximated B.C. Hydro's historical access to the Intertie over the past 4 years. The increased usage of the treaty reservoirs would have provided more flexibility in the management of the total storage available to the coordinated system to shape its firm capability and to regulate flows of the Columbia River.

While BPA and B.C. Hydro were unable to reach an agreement for operating year 1984-85, BPA is hopeful that discussions will begin in a timely fashion to reach an agreement for operating year 1985-86. BPA believes that other opportunities exist for extraregional entities to participate in similar arrangements that are beneficial to both regions.

The MPSC was less concerned over the exclusion of Montana Power Company's (MPC) share of Colstrip 3 as an extraregional resource than they were troubled over questions of consistency. (Jacquot, MPSC, letter dated 8/13/84, pp. 3-4). MPC made no comment on the exclusion of their share of Colstrip 3.

The effect of the Intertie Access Policy is to provide access for BPA surplus power, make Intertie access available for the surpluses of the Pacific Northwest, and to the extent that excess capacity is available to provide for the access for extraregional resources. To accomplish this, BPA considered two alternatives for determining the status of resources located outside the Region and owned by utilities within the Region.

First, BPA considered using resources committed to load under the Power Sales Contracts as the indication of which resources located out of region were actually committed to regional load. This alternative is logical

since these resource exhibits were developed at a time when the Region perceived itself in deficit. Thus, it could be argued that the exhibits truly represented the commitment of utilities to dedicate resources located out of region to regional load.

The second alternative was to prorate out-of-region resources. This alternative would consider that portion of an out-of-region resource represented by the ratio of regional load of the utility to total load of the utility as a regional resource. The remainder would be treated as an extraregional resource. This alternative also was reasonable since it is logical to assume that a utility would actually use its resources to serve its entire load regardless of location. The effect of the second alternative was to decrease average annual firm surplus of some utilities, while increasing the average annual firm surplus of others. However, the total regional average annual firm surplus remained approximately the same under both alternatives. Under the second alternative, more utilities received average annual firm surpluses.

BPA chose to implement the second alternative for this Policy. BPA will continue to observe the operation of the Policy during the next 6 months and will encourage discussion and comment of this issue.

Decision

During periods when Intertie capacity is insufficient to meet all Pacific Northwest requests for capacity, the Intertie will be allocated to the Pacific Northwest utilities. During periods when the capacity of the Intertie is greater than the requests from Pacific Northwest utilities, Intertie capacity in excess of that

required to serve Pacific Northwest utilities will be made available to schedule energy from extraregional resources.

BPA will prorate existing out-of-region resources owned by Pacific Northwest utilities over their regional load for the purpose of defining extraregional resources.

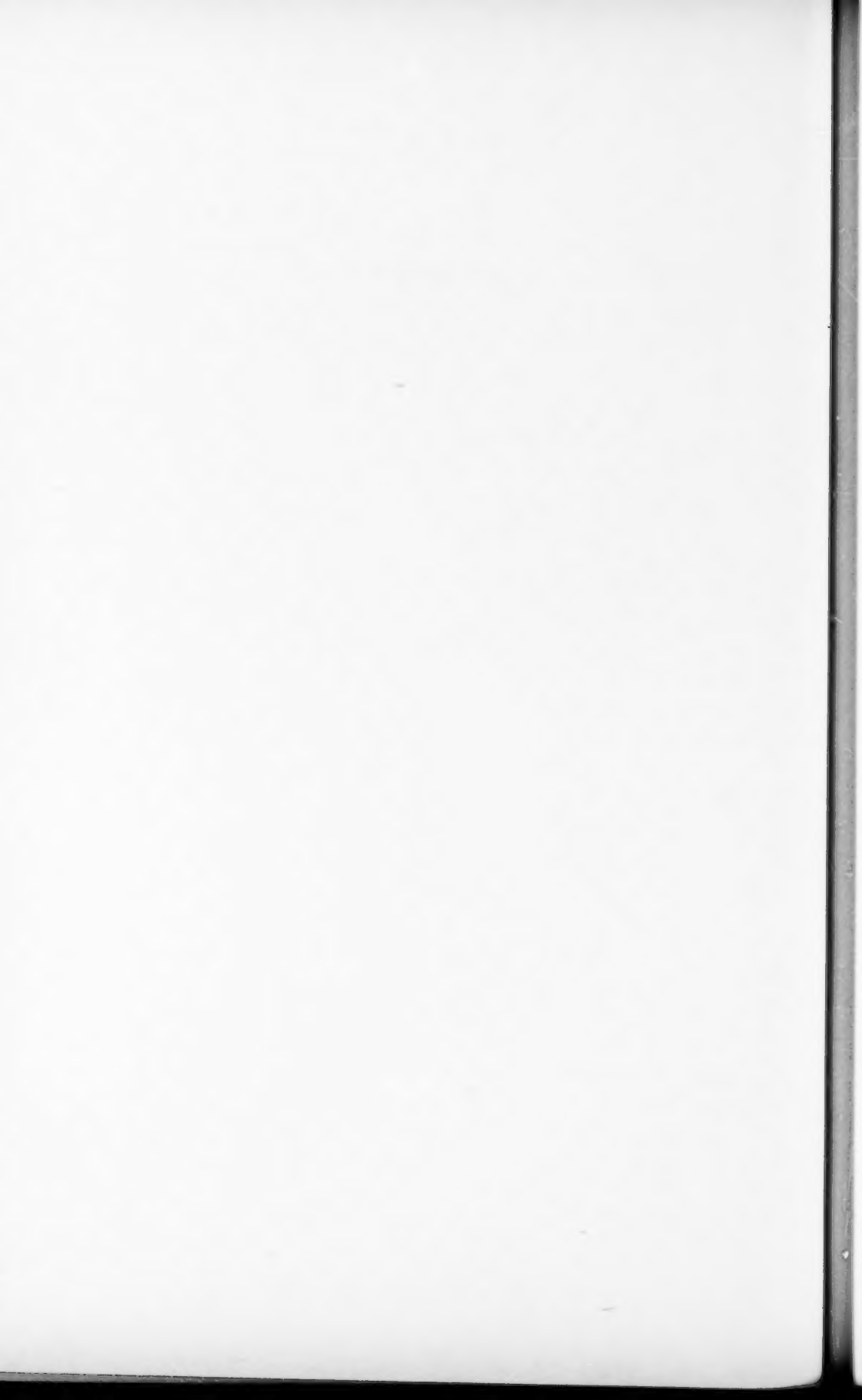
I have reviewed and hereby approve this Record of Decision as supporting my decision of September 7, 1984, to adopt the Near Term Intertie Access Policy on an interim basis.

Issued at Hood River, Oregon this 10th day of September 1984.

/s/ PETER T. JOHNSON
Peter T. Johnson
Administrator

APPENDICES CONTAINING
ABBREVIATIONS
AND LISTS OF COMMENTING PARTIES
HAVE BEEN OMITTED

APPENDIX F



APPENDIX F

[BONNEVILLE POWER ADMINISTRATION]

NEAR TERM INTERTIE ACCESS POLICY

[DRAFT PROPOSAL: FEBRUARY 1985]

I. DISCUSSION

A. Experience During the Initial 6-Month Period

Since September 14, 1984, Bonneville Power Administration (BPA) has monitored Intertie schedules to analyze the effects of the new allocation and scheduling procedures of the Interim Policy. This period of experience shows that the Policy can be administered effectively and implemented with only minor difficulty. Both the Northwest utilities and California utilities have cooperated with BPA in implementing the Policy. Minor adjustments to the implementation procedures have been made at the suggestion of both Northwest and California utilities. Scheduling under the Policy has been streamlined as a result of these changes with final completion of Intertie schedules commonly occurring earlier than in the past. Several observations can be made about BPA's experience under the Intertie Access Policy (IAP) from September 14, 1984 to December 31, 1984.

First, BPA has had considerably better success in selling its surplus firm capability during the fall and early winter of 1984 than in any previous year. The IAP implementation has obviously had a major effect on these sales. It is difficult to quantify the exact extent of this influence because knowledge of the

market conditions which would have been present without the IAP is unavailable. However, a rough comparison indicates surplus firm sales this year of more than six times those in a comparable period last year. Only 740,000 MW of surplus firm energy was sold to California utilities in 1983. During the same period in 1984 BPA sold approximately 4.5 million MW of surplus firm energy.

BPA total revenue recovery is greatly enhanced by these sales compared to last year's circumstances where surplus firm capability was eventually sold at nonfirm prices. Approximately \$110 million in surplus firm energy sales to California utilities have been made since the IAP was put into effect. Only \$50 million worth of both firm and nonfirm energy sales were made during a comparable period in 1983.

Second, the IAP achieved the objective of utilizing the limited Federal portion of the Intertie for BPA and other Northwest utilities on a priority basis ahead of extraregional suppliers. While BPA sales increased as described above, direct extraregional Intertie access was markedly reduced from levels of previous years. This is demonstrated by the 1.8 million MWh sold by BC Hydro in 1983 compared to the 224,000 MW sold over the same 3-1/2 months in 1984. As anticipated in the policy, indirect access for extraregional suppliers replaced a portion of their previous direct sales. These energy sales were used for displacement of Northwest thermal plants and "pass-through" thermal sales on non-Federal portions of the Intertie. Approximately 1.2 million MW of indirect sales were made by BC Hydro and West Kootenay Power and Light.

Third, the IAP has not totally eliminated Northwest market competition or established conditions that

encourage "price gouging" by Northwest suppliers as feared by California purchasing utilities. Because of flexibilities available to California utilities in BPA's existing exchange peaking and capacity contracts, it is impossible to accurately estimate the Intertie usage to be allocated on any given day. To cover potential deliveries under these contracts, allocations have generally been made at a level higher than the actual Intertie usage. This introduces competition among Northwest energy suppliers resulting in the highest priced Northwest energy offers going unsold. This occurred routinely during the last 2 weeks of September and most of December.

Fourth, BPA's experience indicates that Northwest utilities are declaring energy for sale only from resources which are economic to operate. Periodic checks of both capacity and energy declarations by Northwest suppliers verify that reasonable allocations of intertie capacity are being made. BPA is also not aware of any complaints concerning adverse environmental effects resulting from resources actually operated as a result of these allocations.

Finally, Intertie loading during light-load hours appears to be lower after implementation of the IAP than it was during the period immediately preceding the effective date of the Policy. However, it is hard to judge whether or not the unloading was a direct result of this implementation or due to the changing load and resource conditions which occurred in the Southwest on approximately September 20. In August 1984, the Intertie was loaded to approximately 96 percent of available capacity. After implementation of the Policy, intertie loadings dropped slightly to about 93 percent of available capacity. However, compared to 1983,

loadings on the Intertie were actually greater. Ninety-four percent of the total available capacity was utilized in 1984 while only 84 percent was loaded during the same period in 1983.

B. Overview of Changes

1. Existing Pacific Northwest Resources. BPA received inquiries as to whether two projects, Colstrip 4 and Valmy 2, would qualify under the definition of "existing Pacific Northwest resources." The relevant language was in the definition of the term in the Interim Policy. It appears that these two plants qualify under that definition as being extraregional resources dedicated to regional load on September 7, 1984. For clarity, the proposal sets them forth in the definition specifically to show that the issue has been addressed.

2. Assured Delivery for Qualifying Existing and New Firm Contracts. Some clarifying language has been added to section II.D.1 of the proposed Policy. There has been no change in the intent of this section which was to limit the availability of this priority transmission service to firm surplus sales of Pacific Northwest resources. Five requests were received to approve contracts for Assured Delivery. Official notice of approval has been issued for one such contract — a sale between Tacoma City Light and WAPA. A section has been created in which to list approved contracts after decisions have been reached and rendered in writing as provided for in the Interim Policy.

There has been comment questioning the limitation of Assured Delivery to an amount no greater than the utility's average energy firm surplus as contained in Exhibit B to the Policy. For instance, Seattle City Light

requested information as to whether they could expect Assure Delivery to be approved for a possible capacity exchange agreement which would involve capacity deliveries of 200 MW. Seattle's Exhibit B upper limit would be far less than 200 MW. The purpose of the Exhibit B upper limit for Assured Delivery was to preserve equitable overall access to Intertie capacity between Scheduling Utilities and BPA. There was a concern that Assured Delivery for amounts in excess of the Exhibit B level could result in a de facto corner on the market through which a utility could export its nonfirm energy. If Assured Delivery were granted, this utility could possibly receive a priority on available scheduling capacity to market the same type of secondary energy that other utilities were attempting to market on fluctuating nonfirm allocations.

BPA requests comment on this issue. It raises complex questions with respect to consistency with the BPA Power Marketing Program and fair and nondiscriminatory access. Comments on this issue will also be considered in the development of the Long Term Policy.

3. Economic Override. BPA proposed an economic override provision in the July 13 draft of the Interim Policy, but it was not adopted at that time due to overwhelmingly negative comments from the California parties for whose benefit it was intended. This provision, with some modifications, is included in this proposal. During the Interim Policy, there was very little unused capacity to which an economic reallocation could have been applied. When this did occur, however, BPA received inquiries from California utilities as to what action BPA intended to take. In the absence of the economic override

provision, the only action left to BPA was to study the instances of unused capacity. Therefore, the provision is in this proposal and BPA intends to adopt it for use in the unlikely event that Intertie capacity is being wasted due to unreasonable price demands.

When the provision was discussed at public meetings on the Interim Policy, California parties objected to the restriction of the test to operating thermal resources only. The present draft allows for other circumstances to be considered. Pacific Northwest parties feared that economic override would be misused, not to assure that Pacific Northwest prices were economic for displacement of resources, but to trap Pacific Northwest parties into bidding wars with other suppliers. This concern has been addressed by requiring that the Southwest party requesting the reallocation will bind itself to a purchase at an economic price if the Intertie capacity is reallocated.

4. Exhibit B Firm Surpluses. The development of Exhibit B Firm Surpluses has been made somewhat more complex for the effective period of this portion of the Near Term Policy because the period crosses 3 operating years. Comments and updated information on utility surpluses are requested. The Exhibit B amounts which were published on September 7, 1984, generated the submission of some technical information which resulted in changes for a few utilities. The finalized version of Exhibit B for the Interim period is included here to show these changes.

II. NEAR TERM INTERTIE ACCESS POLICY

A. Definitions

1. "Administrator" means the Administrator of BPA and is used interchangeably herein with BPA.

2. "Administrator's Power Marketing Program" or ["BPA's Power Marketing Program" means the aggregate of BPA's power marketing actions taken and policies developed to fulfill BPA's statutory obligations and policy directives. These action and policies are based on the exercise of broad authority to act, consistent with sound business principles, to recover adequate revenue to repay the Federal investment in the Federal system while, at the same time, encouraging the widest possible diversified use of electric power at the lowest possible rates for BPA customers. BPA's Power Marketing Program includes the Administrator's obligation to meet his power supply obligations in the Pacific Northwest and to market surplus power in the Pacific Northwest, in a manner that assures an adequate, reliable, economical, efficient, and environmentally acceptable power supply, while preserving regional and public preference to Federal electric power, and maintaining BPA's present and future rates to all customers at the lowest level possible consistent with sound business principles. BPA's Power Marketing Program also includes the Administrator's objectives to market surplus Federal power to the Southwest utilities at equitable prices under rates adopted pursuant to section 7(i) of the Pacific Northwest Power Act and to assist in the marketing of the region's surplus firm power to the Southwest.

3. "Assured Delivery" means Intertie transmission service provided by BPA under this policy that is only interruptible as a result of uncontrollable forces.

4. "BPA Resources" means Federal Columbia River Power System (FCRPS) hydroelectric projects; resources acquired by the Administrator under long-term contracts in force on the effective date of enactment of the Pacific Northwest Power Act; Exchange Resources consisting of electric power purchased under section 5(c) of the Pacific Northwest Power Act; and resources acquired by the Administrator under contracts in force on September 7, 1984.

5. "Entity" means an owner of a resource other than a Scheduling Utility.

6. "Existing Extraregional Resources" are those resources located outside the Pacific Northwest which are operational on September 7, 1984, other than extraregional resources which qualify as Existing Pacific Northwest Resources.

7. "Existing Pacific Northwest Resources" means: (a) the regional resources of Pacific Northwest utilities that were operational on September 7, 1984; (b) the extraregional resources of Pacific Northwest utilities dedicated to regional load on September 7, 1984, which include Colstrip 4, to the extent of the shares dedicated to regional load by Pacific Northwest utilities and a pro rata portion of the Montana Power Company's share, and the Idaho Power Company's share of Valmy 2; and (c) the regional resources of other Pacific Northwest Entities that were operational on September 7, 1984, and for which relationship with Scheduling Utilities to serve regional load had been established by that date. Existing Pacific Northwest Resources do not include BPA Resources.

8. "Intertie Capacity" means transmission capacity on the Pacific Intertie controlled by BPA through ownership or contract right, increased by electric power scheduled South to North and decreased by loop flow, outages, and other factors that reduce transmission capacity from North to South.

9. "Pacific Intertie" means the Pacific Northwest-Pacific Southwest Intertie that consists of three high-voltage transmission lines (two 500-kilovolt (kV) alternating current (ac) lines and one 800-kV direct current (dc) line) which extent from Oregon into California or Nevada and any additions thereto.

10. "Pacific Northwest" means, as defined in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §839e, (Pacific Northwest Power Act), the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River Drainage Basin, and any contiguous areas, not in excess of 75 air miles from the area referred to above, which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of the Pacific Northwest Power Act which has a distribution system from which it serves both within and without such region.

11. "Scheduling Utility" means a utility that operates a generation control area within the Pacific Northwest, and any utility within BPA's generation control area that schedules with BPA and is designated as a Computed Requirements customer.

12. "Substantial increase" or "substantial decrease," or "substantially interfere," means a change

that is of qualitative significance, of significant measurable effect, and of sufficient magnitude to require remedial action.

13. "Uncontrollable Forces" are defined in General Wheeling Provisions, GWP Form-4R.

B. Term

This Policy is effective on May 1, 1985, and will terminate on September 30, 1986, unless extended by published notice. Scheduling pursuant to this Policy shall commence on the effective date.

C. Conditions for Intertie Access

1. The Administrator will provide Assured Delivery or will allocate available Intertie Capacity to BPA and to other Scheduling Utilities pursuant to the conditions and procedures for scheduling and allocations set forth in this policy, unless otherwise provided by the terms of existing contracts listed in subsection D.1.a., below. An Entity that desires access to the Pacific Intertie may request access through the Scheduling Utility in whose control area the Entity's resource is located. If such resource is in BPA's control area, arrangements shall be made regarding operation of the resource during times when Intertie deliveries cannot be made.

2. The Administrator will provide Assured Delivery or allocate available Intertie Capacity only for power from BPA Resources and Existing Pacific Northwest Resources, except to the extent that Existing Extraregional Resources are permitted access under this Policy.

3. Subject to reserving Intertie Capacity otherwise required by the Administrator the support his Power Marketing Program, the Administrator will provide Assured Delivery or allocate Intertie Capacity for an Existing Pacific Northwest Resource or an Existing Extraregional Resource only when providing such Intertie access:

a. will not substantially interfere with:

- (1) the Administrator's Power Marketing Program; or
- (2) the operating limitations of the Federal system; and

b. will not conflict with:

- (1) the Administrator's existing contractual obligations; or
- (2) any other legal obligations of the Administrator; and

c. will not result in scheduling of energy from resources whose operation will adversely impact fish and wildlife in a manner that results in a substantial decrease in the effectiveness of, or a substantial increase in the need for expenditures or other actions by the Administrator to protect, mitigate, or enhance fish and wildlife; or otherwise substantially interferes with the obligations of the Administrator under the Pacific Northwest Power Act to adequately protect, mitigate, or enhance fish and wildlife including taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable the Fish and Wildlife Program adopted by the Northwest

Power Planning Council pursuant to the Pacific Northwest Power Act.

4. Operating limitations on the FCRPS, which includes the Federal power and transmission systems, result from the Administrator's obligation to operate the FCRPS in an economical and reliable manner consistent with prudent utility practices. These operating limitations include, but are not limited to:

- a. The BPA Reliability Criteria and Standards;
- b. Western System's Coordinating Council (WSCC) Minimum Operating Reliability Criteria;
- c. North American Electric Reliability Council-Operating Committee Minimum Criteria for Operating Reliability; and
- d. the limitations that result from the Administrator's coordination with other utilities and Federal agencies regarding resource and river operations.

5. The Administrator's existing contractual obligations include, but are not limited to those contracts listed in subsection D.1.a. below. Section D describes how BPA will implement its Assured Delivery and allocation procedures to avoid conflict with these contracts.

6. To verify consistency with this policy, upon the Administrator's request, Scheduling Utilities and extraregional utilities that are requesting or have received Assured Delivery or a formula allocation, shall provide the Administrator with a list of resources that are to be operated or that were operated at such hours as access to the Pacific Intertie will be or was

provided, and such other information as the Administrator may reasonably need to implement the Policy. BPA will make such information available to the public to the extent it is not protected from disclosure by law.

7. Special Provision Relating to Fish and Wildlife are:

a. This Policy presumes that BPA Resources, Existing Pacific Northwest Resources, and Existing Extraregional Resources are being operated consistent with applicable licenses, permits, or other provisions of State and Federal law, and that the operation of these resources or providing access for these resources will not adversely impact fish and wildlife resources in a manner described in subsection C.3.c., above, unless the Administrator determines otherwise.

b. Any interested person who wishes to challenge the presumption that an Existing Pacific Northwest Resource or Existing Extraregional Resource is being operated consistent with applicable licenses, permits, or other applicable provisions of State and Federal law must make that challenge with the State or Federal agency responsible for regulation of the resource or administration of that law.

c. Any interested person who wishes to challenge the presumption that the operation of an Existing Pacific Northwest Resource or Existing Extraregional Resource will not adversely impact fish and wildlife in the manner described in subsection C.3.c., above, shall notify the Administrator in writing. The

notification shall state the manner in which and the extent to which fish and wildlife are being adversely impacted. The Administrator will provide a copy of that notification to the Scheduling Utility, to any other owner or operator of the resource or administration of applicable law, and accept public comment before making a determination whether fish and wildlife are being adversely impacted by the operation of the challenged resource.

d. Upon receipt of a determination by the relevant agency, under subsection b., above, that a resource is not in compliance with applicable licenses or permits or other applicable State or Federal law, and a determination by the Administrator under subsection c., above, that operation of the resource will adversely impact fish and wildlife resources in the manner described in subsection C.3.c., above, the Administrator will not provide access to the Pacific Intertie for that resource.

e. For a resource that is being operated in compliance with applicable licenses or permits and other applicable State or Federal law, but that the Administrator determines will adversely impact fish and wildlife in the manner described in subsection C.3.c., above, the Administrator will not provide access unless:

- (1) the owner or operator of the resource agrees to modify the operation of the resource in a manner to assure that the

operation of the resource will not have the adverse impact determined by BPA; or

(2) the owner or operator of the resource agrees to make expenditures or take other actions not inconsistent with the program adopted by the Northwest Power Planning Council to protect, mitigate, or enhance fish and wildlife to offset the adverse impact to fish and wildlife described in subsection C.3.c., above.

f. It is the Administrator's intent that the Long Term Intertie Access Policy will not provide access to the Intertie Capacity under that Policy for resources that are not included in the definition of Existing Pacific Northwest Resources under this Near Term Policy, if construction or operation of these resources will adversely impact fish and wildlife resources in the manner described in subsection C.3.c., above.

D. Assured Delivery and Formula Allocation Methods for Intertie Access

1. Assured Delivery for Firm Contracts

a. BPA will continue to use Intertie Capacity to perform its obligations under the following existing BPA contracts:

(1) Portland General Electric's Contract No. 14-03-55063 providing annual Intertie priority access rights;

(2) Pacific Power & Light Contract No. 14-03-56379 providing annual Intertie priority access rights;

- (3) Washington Water Power's transmission Contract No. 14-03-79101;
- (4) Washington Water Power's transmission Contract No. DE-MS79-81BP90185;
- (5) Western Area Power Administration Contract No. DE-MS-79-84B91627 for the purchase of surplus firm power from BPA and transmission of power purchased from the Basin Electric Power Cooperative;
- (6) Pacific Gas & Electric (PG&E) Contract No. 14-03-54132 for the purchase of BPA's seasonal surplus capacity;
- (7) BPA's Capacity/Energy Exchange Agreements, listed below:

Utility	Contract No. (14-03-___)
(a) Burbank	53290
(b) Glendale	53295
(c) Pasadena	53297
(d) PG&E	54134
(e) SDG&E	58638
(f) SCE	54126

(8) BPA's sale to PG&E confirmed by letter dated July 31, 1984; and

(9) New BPA contracts for which BPA claims Assured Delivery. BPA will give notice to Scheduling Utilities of such transactions.

b. Assured Delivery has been approved for the following contracts under the Near Term Intertie Access Policy:

(1) Tacoma-WAPA power sales agreement, Contract No. DE-MP65-84WP59099.

c. For existing or new contracts of a Scheduling Utility, Assured Delivery may be provided for a term not to extent beyond September 30, 1986, or the termination date of this Policy if extended by BPA, to the extent that such contract:

(1) meets the conditions of section C, above; and

(2) provides for the sale of firm power from specified resources by a Scheduling Utility in which the amount of power to be delivered, the price, and terms for delivery are specified in a manner that assures that the contract is not merely an advance arrangement to sell nonfirm power.

d. BPA will consider the following factors among others, to determine the extent to which a contract of a Scheduling Utility other than BPA can receive Assured Delivery:

(1) the extent to which the contract provides for a firm sale resulting in a net decrease in the region's surplus;

(2) the extent to which the contract provides for return of energy to the Pacific Northwest;

(3) the extent to which the selling price is subject to change based on day-to-day fluctuation in market price;

(4) the extent to which the sale does not increase the costs to the Administrator of Exchange Resources; and

(5) the extent to which the buyer has the right to displace purchases under the contract with nonfirm energy.

e. Scheduling Utilities which desire to arrange for Assured Delivery for a firm contract must submit such contract to the Administrator. The Administrator shall determine whether the submitted contract meets the eligibility criteria set forth above, and will provide notification of this determination in writing specifying the amount and term of Assured Delivery to be provided for the contract. BPA will use its best efforts to notify the Scheduling Utility by mail of the determination not later than 20 days from the date BPA receives the contract.

f. In order to receive Assured Delivery under a contract, firm hourly schedules must be established by the Pacific Northwest and Southwest parties, and be made available to BPA prior to allocation of Intertie Capacity. Assured Delivery will not be provided for BPA's or for a Scheduling Utility's total eligible contracts on any hour that exceeds BPA's or the Scheduling Utility's average firm energy surplus as shown in Exhibit B of this Policy, as modified or revised from time-to-time. A limited exception will be made for WWPCo for its two transmission contracts executed prior to the Interim Policy (see subsection D.1.a.(3) and (4)) with a combined

firm transmission demand greater than WWPCo's Exhibit B Firm Surplus. WWPCo's rights to use these transmission contracts are not changed by the Policy.

g. A Pacific Northwest utility may increase its average firm energy surplus by purchasing surplus firm power from BPA or any Pacific Northwest utility. BPA will adjust the average firm surplus amounts shown in Exhibit B for the buying and selling utilities accordingly.

h. When BPA firm deliveries and Assured Deliveries of other Scheduling Utilities exceed the available Intertie Capacity as determined by BPA, the Pacific Northwest and Southwest parties will establish schedules for delivery.

2. Formula Allocation Methods

a. BPA will determine the Intertie Capacity available for formula allocations described in subsection b., below, after first taking into account the conditions for Intertie access specified in section C above, the Intertie Capacity necessary to serve existing contractual obligations as described in subsection D.1.a., above, and the Intertie Capacity necessary to provide Assured Delivery for qualifying firm contracts as described in subsection D.1.b., above. Access to the remaining available Intertie Capacity will be allocated according to the formulae described below.

b. One of three formulae will be applied depending on which of the following three conditions exists:

(1) **Condition 1:** When Exportable Energy is being scheduled pursuant to the terms of the Exportable Agreement (BPA Contract No. 14-03-73155), then capacity will be allocated pursuant to the Exportable Agreement. An example of an allocation under Condition 1 is shown in Exhibit A. The allocation procedure of the Exportable Agreement is an existing contractual obligation and has not been changed as a result of the Intertie Access Policy development process.

(2) **Condition 2:** When the Exportable Agreement allocation formula is not in effect, but BPA and other Scheduling Utilities declare amounts of power available for access to the Intertie that exceed the available Intertie Capacity determined as described in subsection a., above, the capacity will be allocated pursuant to the following procedure:

(a) On any day the Scheduling Utilities observe as a normal workday, each Scheduling Utility shall submit to BPA declarations of daily quantities of energy and hourly capacity it has available for sale to the Southwest for the period beginning at midnight of the day of declaration and continuing through midnight of the next normal workday.

(b) Allocations for each hour among Scheduling Utilities will be determined and will approximate the ratio of each Scheduling Utility's declaration to the sum of all declarations for each hour multiplied by the available Intertie Capacity. An example of an allocation under Condition 2 is shown is Exhibit A.

(3) **Condition 3:** When the Exportable Agreement is not in effect, but when BPA and other Scheduling Utilities declare power available for access to the Intertie in an amount that does not exceed the available Intertie Capacity, BPA's and each other Scheduling Utility's allocation will be equal to its declaration. An example of an allocation under Condition 3 is shown in Exhibit A.

(4) **Economic Override:** Economic override will be available in either Condition 2 or 3. Economic override may be requested by a Southwest purchaser if it cannot purchase power because the price of the power available to it is priced too high to allow the purchaser to displace the highest cost thermal resources it would otherwise operate, or its highest cost firm contracts, if appropriate. The requesting Southwest purchaser has the burden of proving that the Pacific Northwest price is not economic. The requesting purchaser must also show that the offer is not economic for any other Southwest utilities. If the Pacific Northwest utility is unwilling to lower the

price to an economic level, BPA will reduce its allocated share of the Intertie and reallocate the capacity to other Pacific Northwest suppliers. The requesting Southwest purchaser must agree in advance to purchase power if the economic override procedure results in a reallocation to a seller with a price which is economic, based on the showing made by the requesting purchaser.

E. Extraregional Access

Extraregional utilities will be allowed access as follows:

1. BPA will not provide Assured Delivery to extraregional utilities.

2. Under Condition 1, the Exportable Agreement precludes a formula allocation of Intertie Capacity to potential users that are not parties to that agreement.

3. BPA may, by contract, provide extraregional utilities limited access to Intertie Capacity. Such access, however, would be conditioned on such utilities' participation in the Pacific Northwest's coordinated planning and operation to a greater extent than in the past or agreement to provide other appropriate consideration of value to the Pacific Northwest.

4. Under Condition 3, extraregional utilities will be able to use Intertie Capacity to the extent that capacity is available in excess to the declaration of Scheduling Utilities.

F. Remedies

1. Access to Intertie Capacity is conditioned upon compliance with the terms of this policy.

2. Upon a determination by BPA that the terms of this policy are not being met, BPA will so notify the appropriate person(s) setting forth the nature of the noncompliance and the action(s) that may be taken to achieve compliance.

3. BPA will provide a reasonable opportunity to correct such noncompliance before imposing a remedy. BPA may impose a prospective remedy to account for actions already taken that were not in compliance with this policy.

4. BPA may fashion and impose an appropriate remedy for noncompliance. Remedies that BPA may impose include, but are not limited to:

- a. denial of access for a resource;
- b. refusal to accept schedules; or
- c. reduction in future allocations.

G. Exhibits

Exhibits A and B are a part of this policy.

Exhibit A

Example of Formula Allocation Under Condition 1

Assumptions Used in This Example

1. There is sufficient energy to load the potential Intertie Capacity at 18.5 mills/kWh or less.
2. Declarations of available energy are hourly.
3. Some utilities have firm contracts.
4. Some utilities have priorities.
5. Potential Intertie Capacity equals 5,800 MW.
6. Extraregional utilities are not able to declare or receive an allocation in this condition.

Example of an Hourly Declaration and Allocation

(1)	Firm (2)	Nonfirm Decla- ration (3)	Nonfirm Alloca- ted (4)	Total Alloca- ted (5)	Re- store (6)	Nonfirm Alloca- ted (7)	Final Alloca- ted (8)
BPA	500	3,000	2,635	3,135		2,635	3,135
IOU ₁	200	1,000	878	1,078	$\frac{878}{-1,985} \times 60$	851	1,051
IOU ₂	40	960	843	883	$\frac{843}{-1,985} \times 60$	818	858
PGE ₃		500	440	440	+60	500	500
PA ₁	0	100	88	88	$\frac{88}{-1,985} \times 60$	85	85
PA ₂	<u>0</u>	<u>200</u>	<u>176</u>	<u>176</u>	$\frac{176}{-1,985} \times 60$	<u>171</u>	<u>171</u>
	740	5,760	5,060	5,800			5,860

Description

- Column 1 = Utility that is declaring energy for the allocation procedure.
- Column 2 = The amount of firm energy each utility will deliver, as specified prior to allocation of nonfirm energy.
- Column 3 = Each utility's total hourly nonfirm energy declaration.
- Column 4 = The initial allocation of the potential nonfirm Intertie Capacity.
- Column 5 = The initial total allocation of Intertie Capacity (5,800 MW).
- Column 6 = The reallocation that is required because of Portland General Electric's priority to the Interties. NOTE: BPA does not share in these pro rata reductions necessitated by enactment of priority rights.
- Column 7 = The final nonfirm allocation of the potential nonfirm Intertie Capacity.
- Column 8 = The final total allocation of the potential Intertie Capacity (5,800 MW).

After the final allocation for each hour of the preschedule day or days is determined, Pacific Northwest utilities would be informed of their allocation and would either negotiate sales at other than the 18.5 mills/kWh price or be combined with BPA's allocation at 18.5 mills/kWh and receive a pro rata share of BPA sales.

Example of Formula Allocation Under Condition 2

Assumptions Used in This Example

1. Hourly energy available at 18.5 mills/kWh or less within the region is not sufficient to cover the potential SW market.
2. The hourly energy available at any price is more than sufficient to cover the potential SW market.
3. Utah has other transmission paths and, therefore, will not participate.
4. Some utilities have firm contracts.
5. Potential SW market equals 5,800 MW.
6. No utility has a priority.

Example of an Hourly Declaration and Allocation

(1)	(2)	(3)	(4)	(5)
	Firm	NF decl.	NF alloc.	Total alloc.
BPA	500	2,000	1,350	1,851
IOU ₁	200	1,300	877	1,077
IOU ₂	40	1,960	1,323	1,363
IOU ₃	700	0	0	700
PA ₁	0	100	67	67
PA ₂	0	200	135	135
IOU ₄	0	900	607	607
	<u>1,440</u>	<u>6,460</u>	<u>4,360</u>	<u>5,800</u>

Description:

Column 1 = Utility which is declaring energy for the allocation procedure.

Column 2 = The amount of firm energy each utility will deliver, as specified prior to allocation of nonfirm energy.

Column 3 = Each utility's nonfirm energy declaration.

Column 4 = The initial allocation of the potential nonfirm market.

Column 5 = Total allocation (nonfirm + firm) of the 5,800 MW potential market.

Example of Formula Allocation Under Condition 3

Assumptions Used in This Example

1. Energy available at any price is not sufficient to cover the potential market (exclude BCH and WK).
2. The potential market equals 5,800 MW.
3. Some utilities have firm contracts.
4. No intertie priorities remain.

Example of the hourly declaration and allocation

(1)	(2)	(3)	(4)	(5)
	Firm	NF decl.	NF alloc.	Total alloc.
BPA	500	0	0	500
IOU ₁	200	800	800	1,000
IOU ₂	40	1,460	1,460	1,500
IOU ₃	700	0	0	700
PA ₁	0	100	100	100
PA ₂	0	200	200	200
IOU ₄	0	500	500	500
Subtotal	1,440	3,060	3,060	4,500
BCH	0	2,400	1,200	1,200
WK	<u>0</u>	<u>200</u>	<u>100</u>	<u>100</u>
Total	1,440	5,660	4,360	5,800

Description:

Logic followed in columns 1-5, above, are the same as used in Condition 2, except that BCH and WK have been added. Their allocations are based upon the prorata [sic] distribution of the capacity remaining after first reducing the Intertie Capacity by the sum of the firm and NF Declarations for BPA and other scheduling utilities. It is understood that the net interchange between BCH and BPA is limited to 2,000 MW.

Exhibit B

Utility	Average Firm Surplus ^{1 2}		
	1984-85	1985-86	1986-87
Bonneville			
Power			
Administration	1144	1063	1243
Seattle City			
Light	0	0	1
Tacoma City			
Light	34	41	41
Grant County			
PUD	40	45	56
Douglas County			
PUD	0	9	8
Chelan County			
PUD	23	28	28
Pend Oreille			
PUD	0	0	0
Eugene Water			
and Electric			
Board	28	28	28
Cowlitz County			
PUD	3	1	1
Snohomish			
County PUD	0	0	0
Montana Power			
Company	28	45	53
Idaho Power			
Company	0	21	35

[Exhibit B - Cont.]

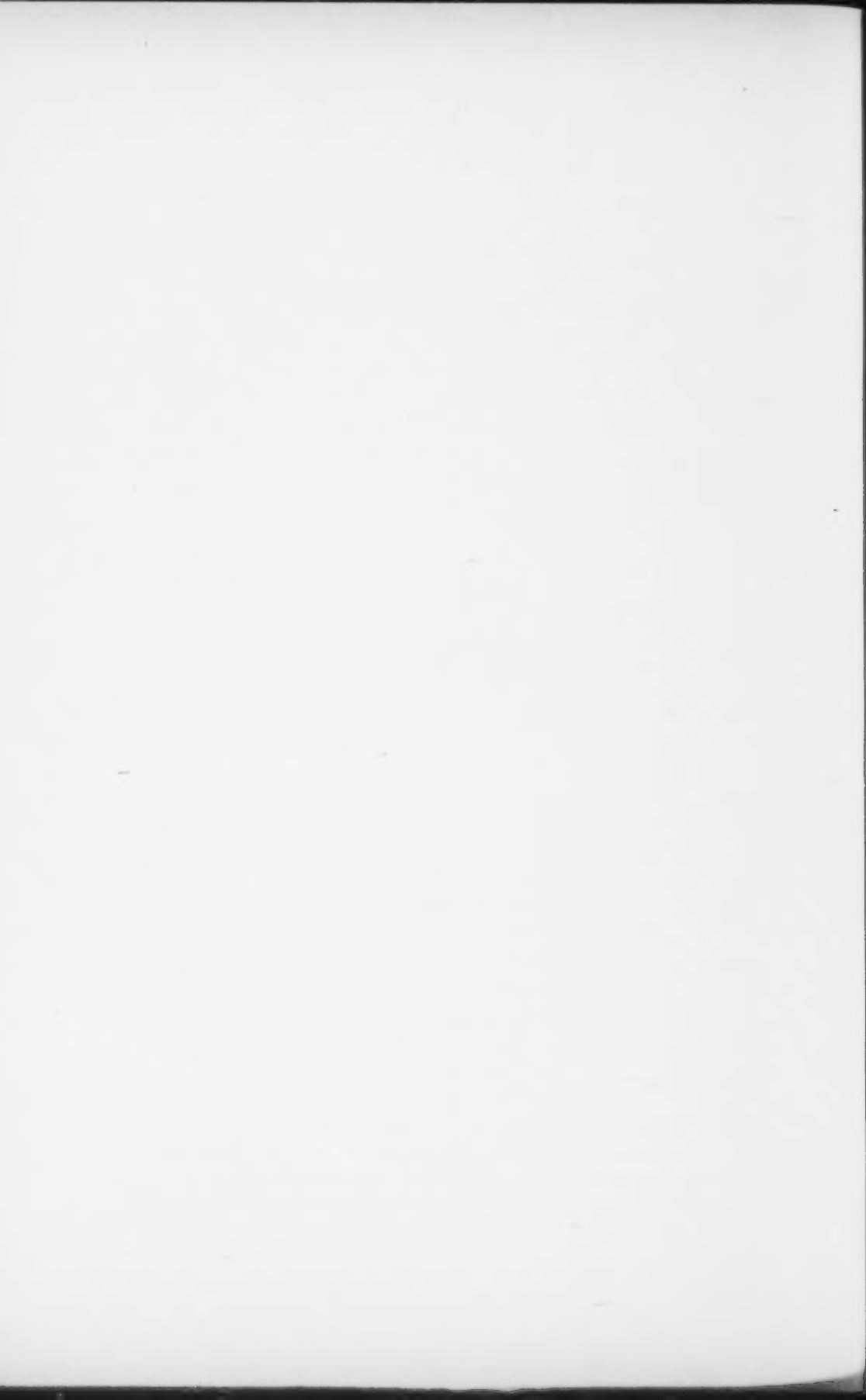
Utility	Average Firm Surplus ^{1 2}		
	1984-85	1985-86	1986-87
Pacific Power & Light Company	379	321	329
Portland General Electric Company	191	179	222
Puget Sound Power & Light	0	0	0
Washington Water Power Company	91	89	102

¹ Except that in no operating year may a Scheduling Utility have Assured Delivery for more energy than the amount of Average Firm surplus shown times the number of hours in the operating year or portion of an operating year.

² The Average Firm Surplus for the months August through December will be the Average Firm Surplus shown times 1.8, except that in the months of November and December, when the Exportable Agreement is in effect, the Average Firm Surplus shall be the amount shown.

(Above table subject to revision.)

APPENDIX G



APPENDIX G

[BONNEVILLE POWER ADMINISTRATION]

NEAR TERM INTERTIE ACCESS POLICY

[50 Federal Register 26827]
[Friday, June 28, 1985]

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Background

The development of BPA's Intertie Access Policy has been an extensive process. It commenced on July 22, 1983, with publication in the **Federal Register** of a Notice of Intent to Develop Intertie Policy (48 FR 33515). This notice was provided consistent with BPA's "Major Power Marketing Policy Procedures" (May 12, 1981, 46 FR 26368).

BPA also produced a Discussion Paper that was published in the **Federal Register** on February 16, 1984 (49 FR 5990). This Discussion Paper described possible BPA policies for use of the Pacific Northwest-Pacific Southwest Intertie (Intertie) by BPA and others within existing BPA contractual obligations.

On July 30, 1984, BPA published its Proposed Near Term Intertie Access Policy in the **Federal Register** (49 FR 30098). Public Comment was received through August 13, 1984.

On September 7, 1984, BPA mailed to all interested parties a copy of the "Notice of Near Term Intertie Access Policy," which was effective on that date and was subsequently published in the **Federal Register** on

November 5, 1984 (49 FR 44232). This policy provided procedures for gaining access to the Federally owned portion of the Intertie for firm and nonfirm transactions to the Southwest. The initial term of this policy was to be approximately 6 months to allow for continuing public discussion, environmental analyses, and an opportunity to gain operational experience under the policy.

An initial Record of Decision was prepared in September 1984 based on the comments received on BPA's proposed policy; the comments made at the public comment forums; any previous comments specifically incorporated by reference by the commenters; and related documents.

On January 31, 1985, BPA mailed to all interested parties a proposed Near Term IAP which incorporated all information received under the Interim IAP. BPA requested comments particularly on the specific parts of this Near Term IAP which had changed from the Interim IAP. At this same time, BPA notified all interested parties that the term of the Interim IAP was being extended to allow sufficient time for completion of the Environmental Assessment on the Near Term IAP. This notice also appeared in the **Federal Register** on February 15, 1985 (50 FR 6379).

BPA prepared an Environmental Assessment on the Near Term IAP which analyzed the potential environmental impacts of the policy. On March 7, 1985, this Environmental Assessment was approved by the Department of Energy. Copies of the Environmental Assessment were mailed to interested parties for comment, with the close of comment period on April 15, 1985.

On April 26, 1985, BPA notified all interested parties that the term of the Interim IAP was again being extended to May 31, 1985 and to also extend the comment period on the Environmental Assessment to May 3, 1985. This notice appeared in the **Federal Register** on May 10, 1985 (50 FR 19781). This second extension was necessary in order to allow BPA to evaluate the Ninth Circuit Court of Appeal's decision in the *Department of Water and Power of the City of Los Angeles v. BPA* (No. 84-7618, April 24, 1985) and to determine how best to incorporate the decision into the Near Term IAP and Administrator's Record of Decision. This extension was also necessary to incorporate comments received during the extended comment period on the Environmental Assessment.

The environmental analysis included in the Environmental Assessment supported a Finding of No Significant Impact (FONSI), which was submitted to the Department of Energy for approval. This approval was given when the FONSI was signed by the Acting Assistant Secretary for Policy, Safety, and Environment on May 31, 1985. The Environmental Assessment and FONSI are available on request from BPA at the locations listed in the "For Further Information Contact" section of this notice or by calling the Public Involvement documents request number.

BPA also prepared a Record of Decision to support the Near Term IAP. The Record of Decision evaluates the issues and alternatives and describes the basis on which the Administrator approved the Near Term IAP. This Record of Decision is also available on request from BPA.

I. Discussion

A. *Introduction*

This Near Term IAP supersedes BPA's Interim IAP and will be in effect until September 30, 1986.

BPA was especially mindful of the importance of this policy to California parties. Comments from California entities were carefully reviewed in light of the experience under the Interim IAP. The information and data provided in those comments did not support claims of harmful and unfair practices. BPA is aware that the comment letters spoke of unaffordable Pacific Northwest prices. However, there is little evidence of this. California utilities have not pursued opportunities to work with BPA to achieve maximum displacement of their thermal resources.

For a complete explanation of the decisions involved in the Near Term IAP, and a description of Intertie activity under the Interim IAP, interested parties may obtain copies of BPA's Record of Decision and Environmental Analysis by calling BPA's Public Involvement Office documents request number.

B. *Overview of Changes*

1. *Exiting [sic] Pacific Northwest Resources.* BPA received inquiries as to whether two projects, Colstrip 4 and Valmy 2, would qualify under the definition of "Existing Pacific Northwest Resources." The relevant language was in the definition of the term in the Interim IAP. It appeared that these two plants qualify under that definition as being extraregional resources dedicated to regional load on September 7, 1984. For

clarity, the Near Term IAP sets them forth in the definition specifically to show that these resources are included.

2. *Assured Delivery for Qualifying Existing and New Firm Contracts.* Some clarifying language has been added to section II.D.1. of the proposed policy. There has been no change in the intent of this section which was to limit the availability of this priority transmission service to firm surplus sales of Pacific Northwest resources. Five requests were received to approve contracts for Assured Delivery under the Interim IAP. Official notice of approval was issued for one such contract — a sale between Tacoma City Light and Western Area Power Administration.

3. *Economic Override.* BPA proposed an economic override provision in the July 13, 1984, draft of the Interim IAP, and again in the proposed Near Term IAP. Once again, there were many negative comments from the California parties for whose benefit it was intended, as well as from Pacific Northwest parties who feared that it could be misused. During the Interim IAP, there was very little unused capacity to which an economic reallocation could have been applied.

Economic override is not included in this proposal. During the term of the Near Term IAP, BPA will monitor the use of the Intertie and, if appropriate, BPA may amend the Near Term IAP to provide economic override provisions.

4. *Exhibit B Firm Surpluses.* In response to comments, a technical explanation of the development of Exhibit B Average Firm Surpluses has been included in the Record of Decision. Exhibit B now contains information as to the general sources of the

information. BPA expects this exhibit to be dynamic with utility surpluses subject to change from time to time. If appropriate, Exhibit B levels will be recalculated to reflect technical corrections to the firm energy capability of resources or changes to firm loans [sic] based on updated information. The most serious challenge to BPA's method of determining Exhibit B amounts came from the Idaho Power Company, who argued that they be allowed to calculate their firm surplus based on median water resource planning criteria. Since Idaho Power Company is the only Pacific Northwest utility using the median water planning criteria, BPA has determined its Exhibit B surplus using critical water assumptions so that all Exhibit B amounts are developed on a comparable basis.

II. Near Term Intertie Access Policy

A. Definitions

1. "Administrator" means the Administrator of BPA and is used interchangeably herein with BPA.

2. "Administrator's Power Marketing Program" or "BPA's Power Marketing Program" means the aggregate of BPA's power marketing actions taken and policies developed to fulfill BPA's statutory obligations and policy directives. These action [sic] and policies are based on the exercise of broad authority to act, consistent with sound business principles, to recover adequate revenue to repay the Federal investment in the Federal system while, at the same time, encouraging the widest possible diversified use of electric power at the lowest possible rates for BPA customers. BPA's Power Marketing Program includes the

Administrator's obligation to meet his power supply obligations in the Pacific Northwest and to market surplus power in the Pacific Northwest in a manner that assures an adequate, reliable, economical, efficient, and environmentally acceptable power supply, while preserving regional and public preference to Federal electric power and maintaining BPA's present and future rates to all customers at the lowest level possible consistent with sound business principles. BPA's Power Marketing Program also includes the Administrator's objectives to market surplus Federal power to the Southwest utilities at equitable prices under rates adopted pursuant to section 7(i) of the Pacific Northwest Electric Power Planning and Conservation Act (Pacific Northwest Power Act) and to assist in the marketing of the region's surplus firm power to the Southwest.

3. "Assured Delivery" means Intertie transmission service provided by BPA under this policy that is interruptible only as a result of uncontrollable forces.

4. "BPA Resources" means Federal Columbia River Power System (FCRPS) hydroelectric projects; resources acquired by the Administrator under long-term contracts in force on the effective date of enactment of the Pacific Northwest Power Act; Exchange Resources consisting of electric power purchased under section 5(c) of the Pacific Northwest Power Act; resources acquired by the Administrator under contracts in force on September 7, 1984; and resources acquired pursuant to 11(b)(6)(i) of the Transmission Act.

5. "Entity" means an owner of a resource other than a Scheduling Utility.

6. "Existing Extraregional Resources" are those resources located outside the Pacific Northwest which were operational on September 7, 1984, other than extraregional resources which qualify as Existing Pacific Northwest Resources.

7. "Existing Pacific Northwest Resources" are: (a) The regional resources of Pacific Northwest utilities that were operational on September 7, 1984; (b) the extraregional resources of Pacific Northwest utilities dedicated to regional load on September 7, 1984, which include Colstrip 4, to the extent of the shares dedicated to regional load by Pacific Northwest utilities and a *pro rata* portion of the Montana Power Company's share, and the Idaho Power Company's share of Valmy 2; and (c) the regional resources of other Pacific Northwest Entities that were operational on September 7, 1984, and for which a continuing relationship with a Scheduling Utility to serve regional load had been established by that date. Existing Pacific Northwest Resources do not include BPA Resources.

8. "Intertie Capacity" means transmission capacity on the Pacific Intertie controlled by BPA through ownership or contract right, increased by electric power scheduled south to north and decreased by loop flow, outages, and other factors that reduce transmission capacity from north to south.

9. "Pacific Intertie" means the Pacific Northwest-Pacific Southwest Intertie that consists of three high-voltage transmission lines (two 500-kilovolt (kV) alternating current (ac) lines and one 1,000-kV direct current (dc) line) which extend from Oregon into California or Nevada and any additions thereto.

10. "Pacific Northwest" means, as defined in the Pacific Northwest Power Act, 16 U.S.C. §839e, the

area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River Drainage Basin, and any contiguous areas, not in excess of 75 air miles from the area referred to above, which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of the Pacific Northwest Power Act which has a distribution system from which it serves both within and without such region.

11. "Scheduling Utility" means a utility that operates a generation control area within the Pacific Northwest, and any utility within BPA's generation control area that schedules with BPA and is designated as a Computed Requirements customer.

12. "Substantial increase" or "substantial decrease," or "substantially interfere," means a change that is of qualitative significance, of significant measurable effect, and of sufficient magnitude to require remedial action.

13. "Uncontrollable Forces" are defined in General Wheeling Provisions, GWP Form-4R.

B. Term

This policy is effective on June 1, 1985, and will terminate on September 30, 1986, unless extended by published notice.

C. Conditions for Intertie Access

1. The Administrator will provide Assured Delivery or will allocate available Intertie Capacity to BPA and to other Scheduling Utilities pursuant to the conditions and procedures for scheduling and allocations set forth in this policy, unless otherwise provided by the terms of existing contracts listed in subsection II.D.1.a., below. Any Scheduling Utility which has access to California markets via ownership or contractual rights over non-BPA transmission facilities will be required to use the capacity of such facilities prior to receiving any access on BPA Intertie Capacity. An Entity that desires access to the Pacific Intertie may request access through the Scheduling Utility in whose control are [sic] the Entity's resource is located. If such resource is in BPA's control area, arrangements shall be made regarding operation of the resource during times when Intertie deliveries cannot be made.

2. The Administrator will provide Assured Delivery or allocate available Intertie Capacity only for power from BPA Resources and Existing Pacific Northwest Resources, except to the extent that Existing Extraregional Resources are permitted access under this policy. For purposes of determining access to BPA's Intertie Capacity, utility declarations of available surplus shall not include amounts of energy which have been purchased from an extraregional utility if such purchase would interfere with the marketing of BPA power or would decrease the Intertie access which BPA and Pacific Northwest utilities would otherwise have. If BPA determines that an extraregional purchase has been improperly included, BPA shall adjust such utility's Intertie access accordingly.

3. Subject to reserving Intertie Capacity otherwise required by the Administrator to support his Power Marketing Program, the Administrator will provide Assured Delivery or allocate Intertie Capacity for an Existing Pacific Northwest Resource or an Existing Extraregional Resource only when providing such Intertie access:

- a. Will not substantially interfere with:
 - (1) The Administrator's Power Marketing Program; or
 - (2) The operating limitations of the Federal system; and
- b. Will not conflict with:
 - (1) The Administrator's existing contractual obligations; or
 - (2) Any other legal obligations of the Administrator; and
- c. Will not result in operation of resources whose use will adversely impact fish and wildlife in a manner that results in a substantial decrease in the effectiveness of, or a substantial increase in the need for, expenditures or other actions by the Administrator to protect, mitigate, or enhance fish and wildlife; or otherwise substantially interferes with the obligations of the Administrator under the Pacific Northwest Power Act to adequately protect, mitigate, or enhance fish and wildlife including taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable the Fish and Wildlife Program adopted by the

Northwest Power Planning Council pursuant to the Pacific Northwest Power Act.

4. Operating limitations on the FCRPS, which includes the Federal power and transmission systems, result from the Administrator's obligation to operate the FCRPS in an economical and reliable manner consistent with prudent utility practices. These operating limitations include, but are not limited to:

- a. The BPA Reliability Criteria and Standards;
- b. Western System's Coordinating Council (WSCC) Minimum Operating Reliability Criteria;
- c. North American Electric Reliability Council-Operating Committee Minimum Criteria for Operating Reliability; and
- d. the limitations that result from the Administrator's coordination with other utilities and Federal agencies regarding resource and river operations.

5. The Administrator's existing contractual obligations include, but are not limited to those contracts listed in subsection II.D.1.a. below. Section II.D. describes how BPA will implement its Assured Delivery and allocation procedures to avoid conflict with these contracts.

6. To verify consistency with this policy, upon the Administrator's request, Scheduling Utilities and extraregional utilities that are requesting or have received Assured Delivery or a formula allocation, shall provide the Administrator with a list of resources that are to be operated or that were operated at such hours as access to the Pacific Intertie will be or was

provided, and such other information as the Administrator may reasonably need to implement the policy. The utility shall clearly indicate whether it considers any such information proprietary. BPA will make such information available to the public to the extent it is not protected from disclosure by law.

7. The following are Special Provisions Relating to Fish and Wildlife:

a. This policy presumes that BPA Resources, Existing Pacific Northwest Resources, and Existing Extraregional Resources are being operated consistent with applicable licenses, permits, or other provisions of State and Federal law, and that the operation of these resources or providing access for these resources will not adversely impact fish and wildlife resources in a manner described in subsection II.C.3.c., above, unless the Administrator determines otherwise.

b. Any interested person who wishes to challenge the presumption that an Existing Pacific Northwest Resource or Existing Extraregional Resource is being operated consistent with applicable licenses, permits, or other applicable provisions of State and Federal law must make that challenge with the State or Federal agency responsible for regulation of the resource or administration of that law.

c. Any interested person who wishes to challenge the presumption that the operation of an Existing Pacific Northwest Resource or Existing Extraregional Resource will not adversely impact fish and wildlife in the

manner described in subsection II.C.3.c., above, shall notify the Administrator in writing. The notification shall state the manner in which and the extent to which fish and wildlife are being adversely impacted. The Administrator will provide a copy of that notification to the Scheduling Utility, to any other owner or operator of the resource and accept public comment before making a determination whether fish and wildlife are being adversely impacted by the operation of the challenged resource.

d. Upon receipt of a determination by the relevant agency, under subsection II.C.7.b., above, that a resource is not in compliance with applicable licenses or permits or other applicable State or Federal law, and a determination by the Administrator under subsection II.C.7.c., above, that operation of the resource will adversely impact fish and wildlife resources in the manner described in subsection II.C.3.c., above, the Administrator will not provide access to the Pacific Intertie for that resource.

e. For a resource that is being operated in compliance with applicable licenses or permits and other applicable State or Federal law, but that the Administrator determines will adversely impact fish and wildlife in the manner described in subsection II.C.3.c., above, the Administrator will not provide access unless:

- (1) The owner or operator of the resource agrees to modify the operation of the

resource in a manner to assure that the operation of the resource will not have the adverse impact determined by BPA; or

(2) The owner or operator of the resource agrees to make expenditures or take other actions not inconsistent with the program adopted by the Northwest Power Planning Council to protect, mitigate, or enhance fish and wildlife to offset the adverse impact to fish and wildlife described in subsection II.C.3.C.[sic], above.

f. It is the Administrator's intent that the Long Term Intertie Access Policy will not provide access to the Intertie Capacity under that policy for resources that are not included in the definition of Existing Pacific Northwest Resources under this Near Term IAP, if construction or operation of these resources will adversely impact fish and wildlife resources in the manner described in subsection II.C.3.c., above.

D. Assured Delivery and Formula Allocation Methods for Intertie Access

1. *Assured Delivery for Firm Contracts.* a. BPA will continue to use Intertie Capacity to perform its obligations under the following existing BPA contracts:

(1) Portland General Electric's Contract No. 14-03-55063 providing annual Intertie priority access rights;

(2) Pacific Power & Light's Contract No. 14-03-56379 providing annual Intertie priority access rights;

- (3) Washington Water Power's (WWPCo) transmission Contract No. 14-03-79101;
- (4) Washington Water Power's transmission Contract No. DE- MS79-81BP90185;
- (5) Western Area Power Administration's Contract No. DE-MS-79-84B91627 for the purchase of surplus firm power from BPA and transmission of power purchased from the Basin Electric Power Cooperative;
- (6) Pacific Gas & Electric (PG&E) Contract No. 14-03-54132 for the purchase of BPA's seasonal surplus capacity;
- (7) BPA's Capacity/Energy Exchange Agreement, listed below:

Utility	Contract No.
(a) Burbank	14-03-53290
(b) Glendale	14-03-53295
(c) Pasadena	14-03-53297
(d) PG&E	14-03-54134
(e) San Diego Gas & Electric	14-03-58638
(f) Southern California Edison	14-03-54126

b. BPA will use Intertie Capacity to perform its obligations under new BPA transactions for which BPA claims Assured Delivery.

c. For existing or new contracts of a Scheduling Utility, Assured Delivery may be provided for a term not to extend beyond September 30, 1986, or the termination date of this policy if extended by BPA, to the extent that such contract:

(1) Meets the conditions of section II.C., above; and

(2) Provides for the sale of firm power from specified resources by a Scheduling Utility in which the amount of power to be delivered, the price, and terms for delivery are specified in a manner that assures that the contract is not merely an advance arrangement to sell nonfirm power.

d. BPA will consider the following factors, among others, to determine the extent to which a contract of a Scheduling Utility other than BPA can receive Assured Delivery:

(1) The extent to which the contract provides for a firm sale resulting in a net decrease in the region's surplus;

(2) The extent to which the contract provides for return of energy to the Pacific Northwest;

(3) The extent to which the selling price is subject to change based on day-to-day fluctuation in market price;

(4) The extent to which the buyer has the right to displace purchases under the contract with nonfirm energy.

e. Scheduling Utilities which desire to arrange for Assured Delivery for a firm contract must submit such contract to the Administrator. The Administrator shall determine whether the submitted contract meets the eligibility criteria set forth above, and will provide notification of this determination in writing specifying the amount and term of

Assured Delivery to be provided for the contract.

f. In order to receive Assured Delivery under a contract, firm hourly schedules must be established by the Pacific Northwest and Southwest parties, and be made available to BPA prior to allocation of Intertie Capacity. Assured Delivery will not be provided for BPA's or for a Scheduling Utility's total eligible contracts on any hour that exceeds BPA's or the Scheduling Utility's average firm energy surplus as shown in Exhibit B of this policy, as modified or revised from time-to-time. In addition, Assured Delivery will only be provided to the extent that the total energy delivery for an operating year does not exceed the utility's total energy surplus for such operating year, as set forth in Exhibit B. A limited exception to the Exhibit B upper limit will be made for WWPCo for its two transmission contracts executed prior to the Interim IAP (see subsection II.D.1.a.(3) and (4)) with a combined firm transmission demand greater than WWPCo's Exhibit B Firm Surplus. WWPCo's rights to use these transmission contracts are not changed by the policy.

g. A Pacific Northwest utility may increase its average firm energy surplus by purchasing surplus firm power from BPA or any Pacific Northwest utility. BPA will adjust the average firm surplus amounts shown in Exhibit B for the buying and selling utilities accordingly.

h. In the event that available Intertie Capacity is reduced such that it is, in BPA's determination, insufficient for BPA firm deliveries and Assured Deliveries of other Scheduling Utilities, the Pacific Northwest and Southwest parties will establish schedules for delivery.

2. *Formula Allocation Methods.* a. BPA will determine the Intertie Capacity available for formula allocations described in subsection II.D.2.b., below, after first taking into account the conditions for Intertie access specified in section II.C., above, the Intertie Capacity necessary to serve existing contractual obligations as described in subsection II.D.1.a., above, and the Intertie Capacity necessary to provide Assured Delivery for qualifying firm contracts as described in subsection II.D.1.b., above. Access to the remaining available Intertie Capacity will be allocated according to the formulae described below.

b. One of three formulae will be applied depending on which of the following three conditions exists:

(1) *Condition 1:* When Exportable Energy is being scheduled pursuant to the terms of the Exportable Agreement (BPA Contract No. 14-03-73155), then capacity will be allocated pursuant to the Exportable Agreement. An example of an allocation under Condition 1 is shown in Exhibit A. The allocation procedure of the Exportable Agreement is an existing contractual obligation and has not been changed as a result of the Intertie Access Policy development process.

(2) *Condition 2:* When the Exportable Agreement allocation formula is not in effect, but BPA and other Scheduling Utilities declare amounts of power available for access to the Intertie that exceed the available Intertie Capacity determined as described in subsection II.D.2a.[sic], above, the capacity will be allocated pursuant to the following procedure:

(a) On any day the Scheduling Utilities observe as a normal workday, each Scheduling Utility shall submit to BPA declarations of daily quantities of energy and hourly capacity it has available for sale to the Southwest for the period beginning at midnight of the day of declaration and normally continuing through midnight of the next normal workday.

(b) A Scheduling Utility's allocation for each hour will be determined and will approximate the ratio of such Scheduling Utility's declaration to the sum of all declarations for each hour multiplied by the available Intertie Capacity. An example of an allocation under Condition 2 is shown in Exhibit A.

(3) *Condition 3:* When the Exportable Agreement is not in effect, and when BPA and other Scheduling Utilities declare power available for access to the Intertie in an amount that does not exceed the available Intertie Capacity, BPA's and each other Scheduling Utility's allocation will be equal to its declaration. An example of an

allocation under Condition 3 is shown in Exhibit A.

E. Extraregional Access

Extraregional utilities will be allowed access as follows:

1. BPA will not provide Assured Delivery to extraregional utilities.

2. Under Condition 1, the Exportable Agreement provides that access to Intertie Capacity is limited to signatories to that agreement.

3. BPA may, by contract, provide extraregional utilities limited access to Intertie Capacity. Such access, however, would be conditioned on such utilities' participation in the Pacific Northwest's coordinated planning and operation to a greater extent than in the past or agreement to provide other appropriate consideration of value to the Pacific Northwest.

4. Under Condition 3, extraregional utilities will have access to the Intertie to the extent that Intertie Capacity is available in excess of the capacity used by BPA and Scheduling Utilities. Utilities outside the Pacific Northwest must fully use other available transmission before receiving access to Intertie Capacity.

F. Remedies

1. Access to Intertie Capacity is conditioned upon compliance with the terms of this policy.

2. Upon a determination by BPA that the terms of this policy are not being met, BPA will so notify the appropriate person(s) setting forth the nature of the

noncompliance and the action that may be taken to achieve compliance.

3. BPA will provide a reasonable opportunity to correct such noncompliance before imposing a remedy. BPA may impose a prospective remedy to account for actions already taken that were not in compliance with this policy.

4. BPA may fashion and impose an appropriate remedy for noncompliance. Remedies that BPA may impose include, but are not limited to:

- a. Denial of access for a resource;
- b. Refusal to accept schedules; or
- c. Reduction in future allocations.

G. Exhibits

Exhibits A and B are a part of this policy.

Issued in Portland, Oregon, on June 13, 1985.

Robert E. Ratcliffe,
Acting Administrator.

Exhibit A

Example of Formula Allocation Under Condition 1

Assumptions Used in This Example

1. There is sufficient energy to load the potential Intertie Capacity at the Exportable Agreement rate.
2. Declarations of available energy are hourly.
3. Some utilities have firm contracts.
4. Some utilities have intertie priorities.
5. Potential Intertie Capacity equals 5,800 MW.
6. Extraregional utilities are not able to declare or receive an allocation in this condition.

Example of an Hourly Declaration and Allocation (in MW)

(1)	(2) Assured Delivery	(3) Energy Decla- ration	(4) Formula Alloca- tion	(5) Total Alloca- tion	(6) Re- store	(7) Adjusted Alloca- tion	(8) Final Alloca- tion
BPA	500	3,000	2,635	3,135		2,635	3,135
IOU ₁	200	1,000	878	1,078	$\frac{878}{-1,985} \times 60$	851	1,051
IOU ₂	40	960	843	883	$\frac{843}{-1,985} \times 60$	818	858
PGE	0	500	440	440	$\frac{+60}{88} \times 60$	500	500
PA ₁	0	100	88	88	$\frac{-1,985}{176} \times 60$	85	85
PA ₂	0	200	176	176	$\frac{-1,985}{176} \times 60$	171	171
	740	5,760	5,060	5,800		5,060	5,860

Description

Column 1 = Utility that is declaring energy for the allocation procedure.

Column 2 = The amount of energy to be delivered for which each utility has Assured Delivery access as specified prior to allocation of remaining intertie capacity.

Column 3 = Each utility's total hourly energy declaration for allocation on nonassured intertie capacity.

Column 4 = The initial allocation of the remaining Intertie Capacity after being reduced by Assured Deliveries.

Column 5 = The initial allocation of Intertie Capacity (5,800 MW).

Column 6 = Reallocation is required because of PGE's priority to the Intertie. NOTE: BPA does not share in these pro rata reductions necessitated by enactment of priority rights.

Column 7 = The final allocation of the remaining Intertie Capacity after being reduced by Assured Deliveries.

Column 8 = The final allocation of the Intertie Capacity (5,800 MW). After the final allocation for each hour of the pre-schedule day or days is determined, Pacific Northwest utilities would be informed of their allocation and would either negotiate sales at other than the Exportable Agreement rate or be combined with BPA's allocation at the Exportable Agreement rate and receive a pro rate [sic] share of BPA sales.

Example of Formula Allocation Under Condition 2

Assumptions Used in This Example

1. Hourly energy available at the Exportable Agreement rate within the region is not sufficient to cover the potential Intertie Capacity.
2. The hourly energy from Pacific Northwest utilities, available at any price is more than sufficient to cover the potential Intertie Capacity.
3. Utah has other transmission paths and, therefore, will not participate.
4. Some utilities have firm contracts.
5. Potential Intertie Capacity equals 5,800 MW.
6. No utility has a priority.
7. PGE has one-fourth ownership of AC Intertie Capacity.

EXAMPLE OF AN HOURLY DECLARATION AND ALLOCATION (IN MW)

(1)	Assured Deliv- ery (2)	Energy Decla- ration (3)	Formula Alloca- tion (4)	Total Alloca- tion (5)
BPA	500	2,000	1,351	1,851
IOU ₁	200	1,300	877	1,077
IOU ₂	40	1,960	1,323	1,363
PGE	700	0	0	700
PA ₁	0	100	67	67
PA ₂	0	200	135	135
IOU ₃	0	900	607	607
Total	1,440	6,460	4,360	5,800

Description:

Column 1 = Utility which is declaring energy for the allocation procedure or using Intertie rights.

Column 2 = The amount of firm energy each utility will deliver, as specified prior to allocation of energy.

Column 3 = Each utility's energy declaration.

Column 4 = The initial allocation of the remaining Intertie Capacity.

Column 5 = Final allocation of the 5,800 MW Intertie Capacity.

Example of Formula Allocation Under Condition 3

Assumptions Used in This Example

1. Energy available at any price is not sufficient to cover the potential market, excluding extraregionals (EXR).
2. The potential Market equals 5,800 MW.
3. Some utilities have firm contracts.
4. No intertie priorities remain.

EXAMPLE OF AN HOURLY DECLARATION AND ALLOCATION (IN MW)

	Assured Deliv- ery	Energy Decla- ration	Formula Alloca- tion	Total Alloca- tion
(1)	(2)	(3)	(4)	(5)
BPA	500	0	0	500
IOU ₁	200	800	800	1,000
IOU ₂	40	1,460	1,460	1,500
PGE	700	0	0	700
PA ₁	0	100	100	100
PA ₂	0	200	200	200
IOU ₃	0	500	500	500
Subtotal	1,440	3,060	3,060	4,500
EXR	<u>0</u>	<u>2,600</u>	<u>1,300</u>	<u>1,300</u>
Total	1,440	5,660	4,360	5,800

Description:

The logic followed in columns 1-5 above, is the same as used in Condition 2, except that extraregional utilities have been added. Their allocations are based upon the capacity remaining after first reducing the Intertie Capacity by the declarations for BPA and other Pacific Northwest scheduling utilities. It is understood that the net interchange between BC Hydro and BPA is limited to 2,000 MW.

EXHIBIT B¹

Utility	Average Firm Surplus ^{2 3}		
	1984-85	1985-86	1986-87
Bonneville Power Administration	1,144	1,550	1,136
Seattle City Light	0	5	0
Tacoma City Light	34	22	22
Grant County PUD	40	45	54
Douglas county [sic] PUD	0	0	0
Chelan County PUD	23	28	28
Pend Oreille PUD	0	0	0
Eugene Water and Electric Board	0	0	0
Cowlitz County PUD	3	3	3
Snohomish County PUD	0	0	0
Montana Power Company	28	26	45
Idaho Power Company	0	75	82
Pacific Power & Light Company	379	274	215

[EXHIBIT B¹ - Cont.]

Utility	Average Firm Surplus ² ³		
	1984-85	1985-86	1986-87
Portland General Electric Company	191	196	229
Puget Sound Power & Light	0	1	25
Washington Water power [sic] Company	91	47	48

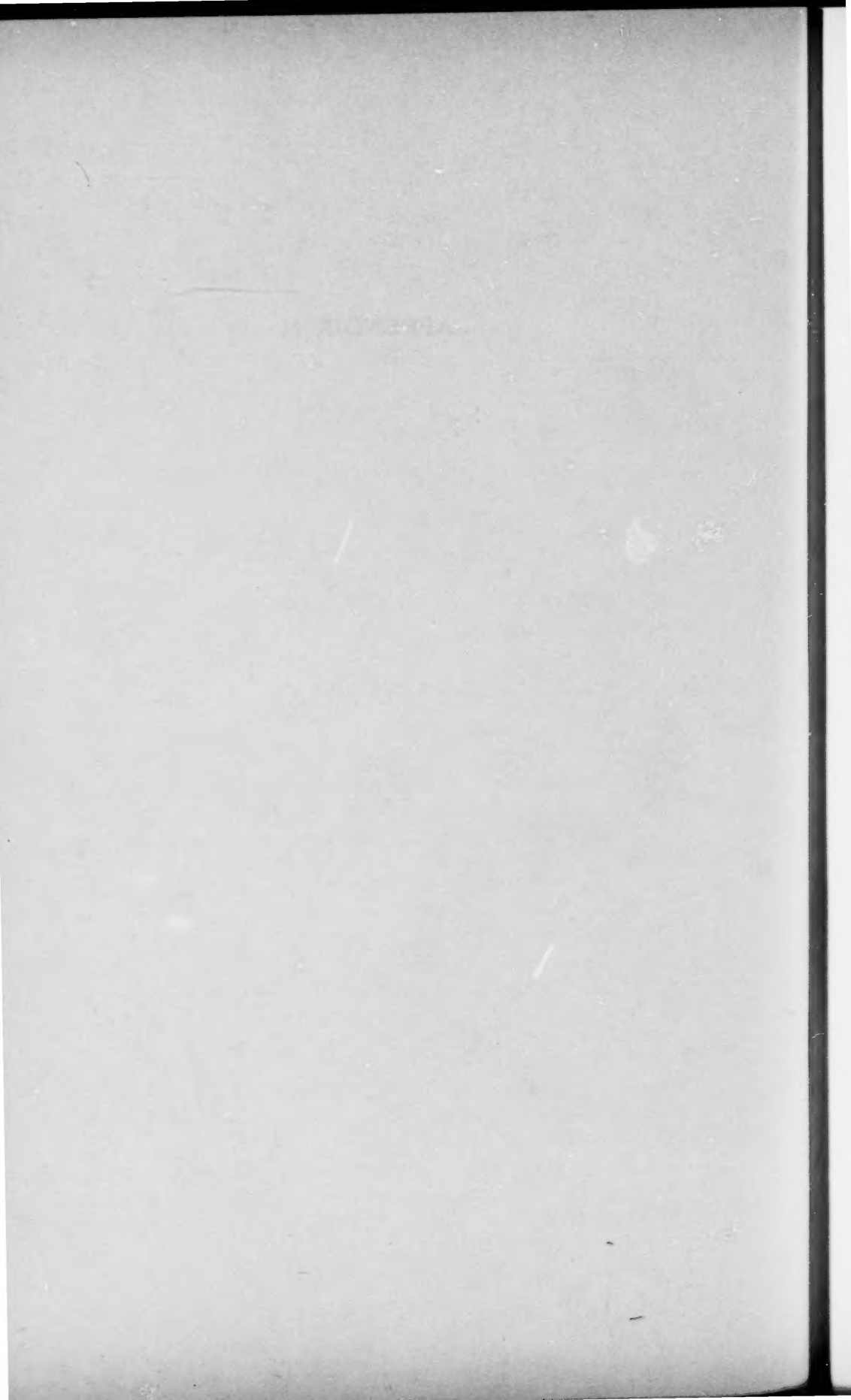
¹ The Average Firm Surplus (AFS) found in Exhibit B for both the Interim and Near Term IAP is based on the firm surplus for the operating years using long range planning data. The determination of the AFS is based on loads from the BPA long term load forecast of July 1984. The planned resource operation is based on PNUCC and BPA data. This data is used to develop a firm load/resource balance and the AFS for each major utility in the Pacific Northwest Region.

² The AFS for the months August through December of OY 1985-1986 will be the AFS shown times 1.8, except that in the months of November and December, when the Exportable Agreement is in effect, the AFS shall be the amount shown. The factor of 1.8 represents the ratio of firm resources shaped into August through December by Coordination Agreement parties for this OY.

³ In no operating year may a Scheduling Utility have Assured Delivery for more energy than the amount of AFS shown times the number of hours in the operating year or portion of an operating year.

NOTE — Above table subject to revision.

APPENDIX H



APPENDIX H

BONNEVILLE POWER ADMINISTRATION NEAR TERM INTERTIE ACCESS POLICY ADMINISTRATOR'S RECORD OF DECISION

May 1985

I. Introduction

Bonneville Power Administration (BPA) is adopting its Near Term Intertie Access Policy (Near Term IAP), effective from June 1, 1985, to September 30, 1986. This Policy is similar to the Interim Intertie Access Policy (Interim IAP) which it supersedes and which has been in effect since September 7, 1984. The adoption of the Near Term IAP is a final action of the BPA Administrator taken pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Pacific Northwest Power Act).

Most of the 37 comments which BPA received on the Near Term IAP incorporated by reference and, in many cases, specifically attached comments which the commenters had previously submitted in response to the Interim IAP. This was appropriate given the similarity between the Interim IAP and the Near Term IAP. BPA's publication of its Revised Near Term IAP (January 1985, pp. 2-4, Discussion) identified only four proposed technical and operating changes to the policy.

In considering the decision to adopt the Near Term IAP, BPA paid particular attention to the comments from California entities regarding experience under the Interim IAP. The reports of California utilities on

Intertie usage have also been researched carefully. In general, although California comments claimed that the Interim IAP resulted in dramatic price increases for PNW power, the data provided by the CPUC showed instead that the only significant change was that BPA average prices reached a par with other non-Federal sellers. The California data actually showed that the price change for non-Federal sellers for the last 4 months of 1983 and 1984 was within the range of increase which would have been expected based on a comparison of California average alternative costs for those two periods.

BPA believes that purported decreased Intertie use under the Interim IAP was probably caused by encroaching minimum generation periods in the SW and conditions other than the prices of PNW economy energy. BPA also noted that although California entities accused the IAP of producing unaffordably high prices, the same respondents denounced the concept of economic override.

After serious consideration of all comments received, BPA has decided to adopt the Near Term IAP. The recent decision by the U.S. Ninth Circuit Court of Appeals in the *Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration*, No. 84-7618, Slip Op. (9th Cir., April 24, 1985), confirmed BPA's authority to allocate the use of the Intertie.

In this Record of Decision (ROD), BPA describes comments on many issues which were raised and disposed of in the ROD on the Interim IAP. BPA stands on its decisions in the Interim IAP ROD with respect to these issues. Therefore, this ROD will frequently incorporate by reference those previous

decisions. Evaluations and decisions which are original to this ROD will focus on the four areas of change listed in the January 1985 Discussion, and on new issues where any were raised.

II. Authority for Action

A. Procedural Requirements

Summary of Comments

SCE continues to object to the purported haste in which, and the procedures by which, BPA implemented the IAP. SCE feels that BPA failed to provide a public hearing procedure under sections 6(c)(1) and 7(i) of the Pacific Northwest Power Act. LADWP asserted that the information presented by BPA in its notice of the proposed Near Term IAP was insufficient to justify the implementation of the policy. (Kendall, SCE, p. 3; Nichols, LADWP, Encl. p. 4.)

Evaluation of Comments

BPA's justification for this policy is contained in this ROD. BPA believes the data and the reasoning to be more than sufficient. The IAP development process should not be seen as a "contested case" in which BPA must prove the legitimacy of its policy decision on the basis of substantial evidence in the record. (See section 9(e)(2) of the Pacific Northwest Power Act.)

BPA has responded to the assertion about formal 7(i) hearings in the Interim IAP ROD (pp. 11-15). With respect to the assertion that section 6(c) of the Pacific Northwest Power Act requires a formal hearing, BPA interprets that section to apply only to BPA resource

acquisitions and other actions related to major issues. The IAP is not a resource acquisition.

Decision

Appropriate procedures, including an extensive and thorough public involvement effort, have been followed in the development of this policy.

B. Statement Regarding Authority

Summary of Comments

LADWP, SCE, and PG&E feel that the proposed Near Term IAP is a restrictive policy which is inappropriate, procedurally defective, and violates principles of due process of law. CPUC asserts that the policy is inconsistent with BPA's statutory obligation. CPUC also states that BPA should recognize that its failure to collect sufficient revenues is principally a function of its refusal so far to base rates charged its extraregional customers on the costs to provide them service. Puget states that BPA has no authority to use its IAP to protect its Power Marketing Program or power operations. (Nichols, LADWP, Encl. p. 3; Kendall, SCE, p. 3; Gardiner, PG&E, p. 2; Fairchild, CPUC, p. 2; Bailey, Puget, p. 1.)

Evaluation of Comments

Many of those who commented on both the Interim and the Near Term IAP questioned BPA's legal authority to adopt any Policy. Because BPA had not previously adopted an Intertie Policy, BPA elected in the Interim IAP ROD to respond to questions

regarding its authority. BPA's Interim IAP ROD therefore responded at length to those assertions of lack of authority (Interim IAP ROD, pp. 6-11, 45-53).

Since BPA's adoption of the Interim IAP, a number of those who commented have challenged BPA's action before the Ninth Circuit Court of Appeals and the Federal Energy Regulatory Commission (FERC), alleging either a lack of authority or arguing that the policy constitutes a rate. BPA has filed numerous responsive pleadings and briefs defending the authority on which the policy is based and arguing that the policy is not a rate. As mentioned previously, the U.S. Ninth Circuit Court of Appeals recently upheld BPA's promulgation of Intertie policy. (*Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration*, No. 84-7618, Slip Op. (9th Cir., April 24, 1985), hereinafter referred to as *LADWP v. BPA*.)

Many of those who challenged the Interim IAP have also indicated informally that they will challenge this Near Term IAP. Therefore, with the exceptions of the issues discussed in sections II.C.-II.G. below, BPA has elected not to address the legal issues presented by its policy in this ROD but to preserve those arguments for the appropriate judicial or administrative forum.

BPA's ROD for this Near Term IAP incorporates by reference those statements of authority contained in the Interim IAP ROD. BPA's position is further set forth in the responsive pleadings and briefs that it has filed with the Ninth Circuit Court of Appeals and FERC. BPA's position in this regard remains unchanged in the Near Term IAP.

C. Role of Other Entities Regarding Intertie Access Policy Development

Summary of Comments

The PNUCC commented that the Pacific Northwest Electric Power and Conservation Planning Council (Regional Council) lacks authority to require that BPA's IAP be consistent with the Regional Council's Energy Plan or Fish and Wildlife Program. (Snowden, PNUCC, p. 2.)

Evaluation of Comments

BPA agrees with the PNUCC and has generally stated its position relative to the role of the Regional Council in the EA that BPA prepared in connection with the Near Term IAP (EA, p. 11). The Regional Council's role is to guide BPA in taking certain actions under sections 4 and 6 of the Pacific Northwest Power Act. These actions do not include BPA transmission activities. On the other hand, BPA recognizes the Regional Council's interest in Intertie policy issues and is aware that the Regional Council is developing recommendations for a Long Term Intertie Policy in revising its Plan.

Decision

BPA will cooperate in this endeavor by commenting on Regional Council proposals for Intertie use and urges others interested in Intertie Policy to act similarly. In addition, BPA will advise the Regional Council on the results of its investigations into interregional power exchanges, as referred to in section

6(1)(2) of the Pacific Northwest Power Act, so that the Regional Council may take such investigations into account in formulating its Plan.

D. Authority to Condition Access on Fish and Wildlife Provisions

Summary of Comments

The PNUCC feels that the fish and wildlife provisions of the proposed policy are inappropriate and unlawful because they are not authorized by the applicable statutes and that nothing in the Pacific Northwest Power Act sanctions or otherwise indicates Congress' intent that Intertie access be withheld on the basis of the conditions set forth in the proposed policy, or that Intertie access may be withheld on that basis for non-Federal, but not Federal, projects. (Snowden, PNUCC, p. 3.)

PP&L states that the Administrator has no authority to condition access to the Intertie upon the consistency of the actions of an applying utility with the fish and wildlife program. (Hammerquist, PP&L, p. 2.)

ICA feels that BPA must not transmit power from any of its own resources or from any other generating source that has adversely affected fish and wildlife, or has caused BPA to have to expend funds to mitigate or enhance these fish and wildlife resources, particularly if such sales, to be transmitted by BPA, are in conflict with the Regional Council's Fish and Wildlife Plan presently in effect, or for which proposals for amendment are now being considered by the Regional Council. (Miles, ICA, p. 2.)

PGE feels that in the proposed policy BPA intends to condition Intertie access on adherence to the Fish and Wildlife Program adopted by the Regional Council. While PGE has no disagreement with the Program, it does not believe BPA should place itself in the role of enforcer of the Program, with Intertie access as a means for compliance. (Dyer, PGE, p. 3.)

Grant PUD states that noticeably absent from the Pacific Northwest Power Act's list of criteria for limiting access to the transmission system is any requirement of compliance or consistency with the fish and wildlife programs of either BPA or the Regional Council created by the Pacific Northwest Power Act. Conditioning Intertie access on these additional considerations would directly contravene two important policies of the statute- —the policy of promoting local independent development of resources and the policy of permitting continued operation of projects with existing Federal licenses. Grant PUD also states that BPA has no authority to deny transmission access to any project operating in compliance with an [sic] FERC license and that it is not clear that BPA possesses any authority to enforce the terms of a FERC license by granting or withholding rights or privileges on the basis of compliance. Grant PUD feels that the proposed policy is so broadly stated and carries such severe penalties as to have an *in terroram* effect disproportionate to any benefits for fish and wildlife likely to result from its implementation and, therefore, paragraphs II.C.3.c. and II.C.7.e. and f. should be deleted. (Myers, Grant PUD, pp. 1-3.)

The WWP believes that the Administrator should not have the unilateral authority to determine if a resource has an adverse impact on fish and wildlife and

deny the resource Intertie access on that basis. They feel that such concerns should be addressed in State and Federal licensing procedures. (Prekeges, WWP, p. 1.)

WADOF feels that BPA is usurping the responsibilities of State and Federal fish and wildlife agencies by allowing the Administrator to determine whether an impact is substantial or what is appropriate mitigation for an impact. These responsibilities reside with the fish and wildlife agencies and tribes, not BPA. (Wilkerson, WADOF, p. 3.)

The Mid-Columbia PUDs feel that if BPA plans as a matter of policy to give fish and wildlife issues special treatment over all other Administrator obligations under applicable law, rules, and regulations, they strongly object. They believe their point is simple, that sections II.C.3.a. and b. and II.C.4.d. provide adequate recognition of all environmentally related obligations of and limitations on the Administrator. (Wright, Mid-Columbia PUDs, p. 2.)

Puget and IPC feel that BPA has no authority to deny Intertie access based on its perception of fish and wildlife impacts of generating resources. In addition, IPC believes that the release of water from Brownlee cannot and will not be considered by BPA as adversely affecting the Administrator's efforts on behalf of fish and wildlife for the purpose of Intertie access for Assured Deliveries. (Bailey, Puget, p. 1.; Barclay, IPC, Encl. pp. 1-2.)

The ICP doesn't expect to see the Fish and Wildlife Provisions triggered during the term of the Policy, but as a precedent it is unacceptable. (Schultz, ICP, pp. 4-5.)

The CRITFC asserted that BPA has a trust responsibility to assist tribal governments in the protection and management of their natural resources. (Wapato, CRITFC, p. 1.)

Evaluation of Comments and Decision

No new issues were raised by these comments. BPA adopts its positions as stated in the Interim IAP ROD (pp. 63-82). See also the discussion at II.B.

E. Is IAP Anticompetitive?

Summary of Comments

The CPUC, LADWP, and SCE accuse the Near Term IAP of eliminating price competition among NW suppliers. LADWP and SCE find BPA's statement that the IAP has not totally eliminated competition to be an acknowledgement that competition indeed has been reduced. SCL wants further explanation on how BPA's estimate, for scheduling purposes, of potential Intertie usage by California utilities with capacity/exchange contracts introduces competition among PNW suppliers. (Fairchild, CPUC, p. 2; Nichols, LADWP, Encl. p. 6; Kendall, SCE, pp. 1-2; Garman, SCL, p. 1.)

SCE regards the Near Term IAP as a classic cartel device that has altered an established course of business for the purpose of unilaterally raising NW and BPA prices. PG&E calls for the retention of some "competitive restraints" on NW pricing, while LADWP finds that "price gouging" has indeed occurred. (Kendall, SCE, p. 1; Gardiner, PG&E, p. 2; Nichols, LADWP, Encl. p. 8.)

Evaluation of Comments

In general, many of the California entities allege that the Interim IAP is *per se* anticompetitive. They assert, among other things, that the IAP has eliminated competition. Some allege that allocating Intertie capacity on a pro rata basis is a classic cartel device. This is a puzzling comment given the following statement by the CPUC which proposes a pro rata allocation among PSW parties:

In recognition of the need for many California consumers to share in the benefits of federally generated power and in consideration of the benefits received by interconnection with the existing Interties, the [California] Parties [which own or will own an interest in the southern portion of the Intertie] agree, in times when the availability of nonfirm energy marketed by Bonneville Power Administration is less than the available transfer capability in the Interties, that said Participants will limit their use of their Project and Intertie Capacity for such energy so as not to exceed a pro rata share of such energy. (CPUC, *The Marketing of the Surplus Northwest Power to California*, 1/30/85. p. 9; hereinafter referred to as *Marketing NW Power*.)

The criticisms of the California commenters would have some credibility were the NW-SW market free and open in the absence of the IAP. As the CPUC statement above indicates, this is not the case. In fact, as LADWP openly states:

Los Angeles believes that the Federal legislation and BPA's statements translate into a free and open policy for access to the northern end of the Intertie to all entities without interference from BPA for that capacity above BPA's contractual requirements. This contrasts quite differently with access to the southern end of the Intertie where we could not advocate or support a free and open Intertie policy (Nichols, LADWP, App. A, p. 3.)

As these statements indicate, the California commenters criticize BPA's IAP but do not acknowledge how the markets in California actually function. In its letter, SCE complains about instances of SCE being unable to make Intertie purchases due to NW prices, but fails to mention that other California entities who might have been willing to pay NW prices do not have access to use SCE's unused Intertie capacity. This unwillingness of SCE and other California Intertie owners to offer other utilities access when there is unused capacity on their share of the Intertie is particularly significant in light of minimum generation levels of some California systems which limit these systems' ability to accept PNW economy energy. (See section III.C.)

BPA has addressed the effect of the Interim IAP on competition in the California markets for electric power. (See Interim IAP ROD, pp. 41-44 and 38-39.) BPA incorporates its previous discussion by reference into this record. BPA has stated that the general structure of the IAP is warranted, based upon the restricted market conditions at the southern end of the Intertie and the need to generate sufficient revenues to

repay the Federal Treasury (Interim IAP ROD, p. 40). None of the commenters challenged this discussion of the expected effects of the Interim IAP on the market. (Interim IAP ROD, Section II.G., pp. 31-44.)

Competition has not been eliminated by the Interim IAP. Competition exists and, in some ways, has been enhanced under the IAP. By providing for new Assured Delivery sales, the IAP creates a market for firm energy that did not exist prior to the policy. Additionally, the California market itself remains competitive since there is a choice of suppliers for the California utilities. PNW utilities must compete not only with one another but against other suppliers in California and the Inland SW. As evidenced by comments from the California utilities themselves as well as from information from the CEC and FERC Form 1 and other documents, the California utilities have a range of choices in their energy and capacity purchases.

California utilities have long standing relationships to import power from public and private utilities and marketing entities in the Inland SW, which includes Utah, Nevada, Arizona, New Mexico, Colorado, Mexico, and parts of Wyoming and East Texas. California utilities own portions of SW generating resources and also purchase capacity, firm energy, and economy energy. In 1983 California utilities purchased 2,117 MW of capacity, 12,300 GWh of firm energy and 7,074 GWh of economy energy from the Inland SW ("Final Draft Energy Report" Appendices Vol. II CEC April 1985, pg. 4.2-28). During the period while the Near Term IAP is to be in effect, California purchases from the Inland SW will remain high,

thereby ensuring competition with potential NW imports in the California market.

PNW utilities' need to compete against the prices set by other suppliers located in California and the Inland SW is noted by SCE: "This reduction [in SCE's PNW-PSW Intertie utilization] was made because PNW prices were not competitive with SCE's alternative sources of economy energy, which were located outside the PNW." (Kendall, SCE, p. 2.) In other words, a limitation on prices that BPA and PNW utilities could charge was the price offered by other competitors located outside the PNW.

The IAP does not set the prices charged by PNW utilities. In fact, as discussed in III.B. below, the selling prices of non-Federal sellers did not change significantly under the IAP. In some instances during the Interim IAP, buyers and sellers were unable to agree on price leaving Intertie capacity unused because other cheaper alternative sources of power were available to California buyers. This is no more dramatically illustrated than the instance cited by the CPUC where PP&L was forced by competition to reduce its asking price from 34.2 mills/kWh to 27.9 mills/kWh because it could not sell power at the higher prices. (*Marketing NW Power*, p. 20.) At the same time, PGE's asking price was 25 mills/kWh according to the CPUC. *Id.* This example illustrates price flexibility and competition, not unused capacity on the Intertie. As observed by the CEC:

Although California utilities lose some control over electricity production costs by relying on out-of-state sources, they are able to choose the least-cost among those sources,

leading to lower costs for California consumers.

Because sellers in the Northwest and Southwest compete with each other and with in-state resources, prices must remain competitive or imports will be displaced. (CEC, Biennial Report V, *Issue Paper on Out-of-State Imports*, 3/28/85, p. 20.)

Competition also occurs among PNW utilities and is increased as a result of the allocation process. When developing Intertie schedules, BPA must estimate the activity under the capacity energy exchange agreements with California parties. BPA's estimate of available Intertie capacity therefore is often larger than actual Intertie usage. This assures that PNW sellers will have to compete with one another to ensure that they will have sufficient sales even in a market when PNW allocations exceed PSW demand.

An additional source of competition is PGE's ownership of 700 MW of Intertie capacity which is not subject to BPA's IAP. (See discussion under section III.D.)

F. Has the IAP Established a De Facto Floor Price?

Summary of Comments

The CEC charges that in addition to setting a floor for prices, preliminary data indicates that the average price paid for NW nonfirm power by California parties was dramatically increased over previous years sales. CEC feels the fact that no nonfirm sales have been made below BPA's Standard Nonfirm rate to be

convincing evidence that the policy has in fact resulted in price-fixing. (Imbrecht, CEC, pp. 2-3.)

Evaluation of Comments

The Interim IAP did not create a *de facto* floor price of 18.5 mills/kWh as charged by some commenters. The comments did not distinguish the Interim IAP from the operation of the Exportable Agreement, which was in effect long before the policy. Section II.D.2.6.(1) of the Interim IAP stated that the Exportable Agreement is an existing BPA contractual obligation and its allocation procedure has not been changed by the policy. The Ninth Circuit has upheld the legality of the Exportable Agreement (*LADWP v. BPA*).

The Exportable Agreement provides for allocation of Intertie access, during specified times, for PNW parties willing to sell energy at BPA's rate for such energy. The Exportable Agreement would not be an exception to the nonfirm rate rule that the 11.0 mills/kWh rate would be used, but only if BPA could gain more revenue by doing so. This has not yet occurred during the term of the Interim IAP. The fact that the Exportable Agreement price has been 18.5 mills/kWh during the Interim IAP is not due to anticompetitive practices. Instead, 18.5 mills/kWh was a "zero-benefit" point for PNW sellers in that BPA and other PNW parties could not gain enough additional sales by lowering their price to realize a net increase in revenues. This has been due to the relationship between the fixed BPA rate levels applicable under the Exportable Agreement and the decremental cost levels in the PSW.

Decision

BPA's IAP clearly does not establish a *de facto* floor price for energy sold to California.

G. NEPA

Issue #1: Lack of Appropriate Prior Analysis

Summary of Comments

LADWP and SCE state that BPA totally disregarded NEPA regulations requiring the development of an Environmental Assessment and an Environmental Impact Statement prior to—not in conjunction with or as justification for—implementation of the IAP. (Nichols, LADWP, Encl. p. 4; Kendall, SCE, p. 3.)

Evaluation of Comments

When BPA proposed a multistep IAP development and environmental analysis process, most comments from environmental organizations supported that strategy (Interim IAP ROD, p. 22). Then, as now, objections to BPA's multistep approach have come primarily from California parties—in this case, LADWP and SCE, whose interests in BPA's Near Term IAP are primarily economic.

Implementation of the Interim IAP was immediately necessary to enable businesslike marketing of Federal surplus power with appropriate cost recovery. The implementation of the Interim IAP in September 1984 provided valuable operational experience aiding the policy development and EA of the Near Term IAP. Implementing the Interim IAP in September provided

the benefit of having a trial allocation procedure in place during the fall and winter months when streamflow river conditions most often result in Conditions 2 and 3 (Interim IAP ROD, p. 23).

The Near Term IAP provides Intertie access to existing resources only. It is, therefore, not expected to significantly affect resource planning or development. BPA is now developing a Long Term IAP to replace the Near Term IAP after September 1986. The Long Term IAP will govern the access of existing and potential future resources to the Intertie. BPA has begun to prepare an EIS on the Long Term IAP, which will examine the Long Term IAP's possible effect on resource planning and development, and other issues not raised under the Near Term IAP.

Issue #2: Lack of Positive Analysis

Summary of Comments

Both NOAA and LADWP feel that the EA should directly evaluate the impact of resources operated for Intertie sales, rather than assume that there are no adverse impacts since there have been no "complaints." They feel that it would be irresponsible to wait for complaints, and that doing so would be contrary to the spirit of environmental laws. LADWP stated that BPA has provided no firm data on actual operations under the policy. (Evans, NOAA, p. 2; Nichols, LADWP, Encl. p. 4.)

The WADOF asks that the Near Term IAP be clear and easily understandable and its implementation create no unassessed or unmitigated environmental impacts. (Wilkerson, WADOF, p. 2.)

Evaluation of Comments

Contrary to the assertions of LADWP and NOAA, BPA did not rely on the absence of complaints about the Interim IAP to conclude that the Near Term IAP would have no significant environmental impacts. The EA for the Near Term IAP was based on analysis of the actual effects of the Interim IAP and of the potential effects of the Near Term IAP. BPA believes its environmental analysis of the Near Term IAP was thorough and rigorous. Environmental analysis on the basis of experience under the Interim IAP and projections regarding the Near Term IAP indicate no significant environmental impacts from the proposed Near Term IAP. (See EA and FONSI on the Near Term IAP.)

Decision

BPA's policy development and environmental assessment process has been an appropriate and useful tool to allow a meaningful analysis of the Near Term IAP. BPA has concluded that the Near Term IAP will not cause significant environmental effects.

III. Experience Under the Interim IAP

A. Reclassification of Energy as Firm or Nonfirm

Summary of Comments

The CEC asserts that energy traditionally sold as nonfirm was reclassified and sold as firm at higher prices under the Interim IAP but without status as a firm energy sale qualifying for Assured Delivery.

LADWP believes that the IAP has enabled BPA to survey the market and choose the highest price from its various rates that the market will bear. (Imbrecht, CEC, p. 2; Nichols, LADWP, Encl. p. 6.)

Evaluation of Comments

There has been no "reclassification" of nonfirm energy as firm energy under the Interim IAP in order to extract a higher price. BPA has used the same method for decades to classify energy as firm energy or as nonfirm or "secondary" energy based on critical water planning criteria. California commenters have used the term "nonfirm energy" in a manner that confuses nonfirm energy with sales of energy under terms providing for nonfirm delivery. BPA surplus firm energy, whether it is purchased for a long or short term, is distinguishable on planning and operational bases from nonfirm energy produced in excess of the firm capability of BPA's resources. In setting its rates pursuant to section 7(i) of the Pacific Northwest Power Act, BPA has allocated costs such that rates for surplus firm power are higher than rates for nonfirm or secondary energy. However, BPA has been compelled to sell surplus firm power at lower, nonfirm rates, and under reduced Assured Delivery conditions because the supply of surplus firm power is larger than the current market.

The comments asserted that BPA "surveyed" the market to choose the highest possible prices that the market would bear. This is entirely at odds with the facts. California utilities have not agreed to share information on their operating costs data with BPA or other PNW utilities. This requires PNW sellers to make blind offers in an attempt to determine the size

of the PSW market at a given price level. When BPA offers surplus firm energy at the rates specified in its firm rate schedules, it is not "surveying" the market to see what price it will bear.

Decision

BPA Intertie sales have been appropriately classed as sales of firm or nonfirm energy based on clear planning and operational criteria. The sales have been priced consistent with approved rate schedules.

B. Changes in Relative Intertie Prices

Summary of Comments

PG&E states that it would find a share-the-savings approach far less oppressive than the pricing policy under the Interim IAP and proposed Near Term IAP. PG&E feels that California consumers already have been hit with rate increases to pay for increased expenses of purchased power from the PNW. (Gardiner, PG&E, pp. 3, 6.)

The CEC feels that the IAP has already had a substantial negative impact on California and has resulted in a major shift in planning with regard to future purchases of NW nonfirm power. If the IAP is upheld by the courts, it will have given BPA the ability, unilaterally, to remove most of the benefits California could receive from a new Intertie by increasing future surplus energy rates to the point where it is only marginally preferable for California utilities to buy BPA surplus energy. The CEC feels that BPA has provided no assurance that the IAP will not be used in

the future to “gouge” California ratepayers. (Imbrecht, CEC, p. 1.)

Evaluation of Comments

Most California entities charge that the Interim IAP has resulted in drastic price increases. Certain sales and price data were provided in the CPUC staff paper entitled “The Marketing of Surplus Northwest Power to California” (January 30, 1985). BPA price data is limited to BPA transactions since we do not have records of the transaction prices of other PNW utilities. However, the CPUC paper contained figures on prices paid by PSW utilities to other “principal non-Federal” suppliers which can be used for comparison of the last 4 months of 1983 and 1984.

The data supplied in the CPUC paper shows that the weighted average price changes for non-BPA power from 1983 to 1984 under the Interim IAP were not dramatic. (See Table 1.) This does not support the assertions of price fixing and cartelization. The comments by CEC state that preliminary data indicates that “. . . the average price paid for NW nonfirm power by California parties was dramatically increased . . .” over the previous year. The comment goes on to recite prices paid by SCE, PG&E, and LADWP in 1983 and 1984, which clearly are based on BPA rates, rather than NW averages. (Imbrecht, CEC, p. 2.) This can be seen by reviewing the CPUC data in Table 1 on BPA and other NW prices. In addition, the CEC comment misleadingly characterized the comparison as being a comparison of prices for “nonfirm power.” The data in Table 1 contain figures comparable to those cited by CEC, but are described as being average prices paid for *all* Intertie sales,

including sales of surplus firm, particularly for BPA in the last quarter of 1984.

According to the CPUC data, average non-BPA prices went from 23.3 mills/kWh in 1983 to 26.02 mills/kWh in 1984. This price increase over a year's time can be explained by taking into account BPA's rate increase in November 1983, the raising of the applicable rate under the Exportable Agreement to BPA's nonfirm rate, and by examining the different load-resource conditions in the SW in the last 4 months of 1983 compared to 1984. The 1983 period was marked by high northern California hydro availability, resulting in decreased PSW operating costs. In contrast, the 1984 period was marked by high SW temperatures and loads which result in higher incremental operating costs. The supply of nonfirm power in the NW also changed, with no nonfirm energy available for export during the latter part of 1984.

The CPUC data also shows that the price of BC Hydro power paralleled that of non-BPA PNW sellers in 1983 and of BPA power in 1984. This indicates that BC Hydro prices follow the market, with or without the IAP, and argues against the California utilities' assertions that they have been economically damaged by the policy provisions on extraregional access. (See also section IX below.)

The single most significant change was in the amount and price of BPA power. Gaining greater Federal revenue to enable BPA to repay the Treasury was indeed a goal of the policy. The CPUC data indicated that the BPA average price went from 14.6 mills/kWh in the relevant period of 1983 to 26.0 mills/kWh in 1984. This is consistent with BPA

records of sales of Federal surplus firm power for the 1984 period. In 1983, BPA's sales were largely under its nonfirm rate schedules since California utilities refused to purchase under the surplus firm rates. This forced BPA to sell firm power at less than its cost. The 1984 average price is based on sales made at the surplus firm rates during the Interim IAP. The CPUC data indicates that PSW utilities apparently bought *less* BPA power in 1983 when it was less expensive than they did in 1984.

Prior to adoption of the Interim IAP, BPA was unable to sell its surplus firm power at prices reflecting the costs of making such power available due in part to the energy purchasing strategies and Intertie access policies practiced by the owners of the southern portion of the Intertie. (See BPA Discussion Paper, 2/15/84, pp. 8-10.) The resulting disparity in the average price received by BPA for energy sold to California utilities in 1983 compared to that received by other PNW utilities and BC Hydro is reflected in figures compiled by the CPUC. From September to December 1983, BPA sold 2,620 GWh of energy to California at an average price of 14.6 mills/kWh. During the same period, BC Hydro sold 1,997 GWh to California at an average price of 23.2 mills/kWh and NW utilities sold 2,924 GWh, also at 23.2 mills/kWh.

The change in BPA's prices noted by the California commenters can be explained by examining the types of energy available in the NW market. 1983 was a year of abundant hydropower in the NW and there were ample amounts of nonfirm energy available for California sales. The summer and fall of 1984, however, was sufficiently dry that the only energy available for sale to California was surplus firm.

Surplus firm energy is a more valuable commodity than is nonfirm energy, and therefore commands a higher price. As seen in Table 2, the NW sold only surplus firm energy from September 1984 until January 1985 when the Exportable Agreement was triggered.

The price disparity between BPA and other sellers is also seen in FERC Form 1 data for California utilities (see Table 3). In 1983, BPA sold 6,853 GWh of economy energy to PG&E at an average of 11.6 mills/kWh, and sold 6,965 GWh to SCE at an average of 9.0 mills/kWh. During the same year, PG&E's prices from other NW suppliers averaged 29.6 mills/kWh, while SCE's purchases averaged 22.7 mills/kWh, the price quoted by the CPUC for the latter part of 1984.

In 1983, PG&E purchased energy from the Inland SW at an average cost of 25.2 mills/kWh (source: PG&E's 1983 FERC Form 1). SCE's Reasonableness of Operations Report indicates that from January 1 to November 30, 1983, the average price for Inland SW imports was 24.1 mills/kWh (page III-127). This was slightly higher than the prices paid to NW suppliers and BC Hydro during the last 4 months of 1983, and at least 10 mills/kWh greater than the price paid for BPA energy during that period.

This disparity in price occurred because the Intertie practices of the southern owners permitted them to purchase from PNW utilities at prices which undercut BPA's offered surplus firm prices until BPA was forced to sell firm power below cost, under its nonfirm rate schedules and at market clearing prices, in order to make substantial sales. (See Interim IAP ROD,

pp. 39-41.) This produced economic waste and contributed to an underrecovery of BPA's costs.

One of the objectives of the Interim IAP was to enable BPA to gain assured access to a portion of the Intertie in order to market its power at prices more closely reflecting the cost of making such energy available. Between September and December of 1984, BPA had little nonfirm energy available for sale above the firm surplus energy in its system. However, firm power was available, due to the power surplus in the NW. The IAP helped BPA market its firm power at prices more closely reflecting those which its other competitors have historically received and more closely reflecting the cost of making such energy available. The CPUC and FERC Form 1 figures reflect this effect. (See Tables 1 and 3.)

Decision

The Interim IAP has not resulted in significant changes in non-Federal prices. Non-Federal average prices were essentially the same under the Interim IAP as they were the year before. BPA average prices were far below other sellers prior to the policy, but now are comparable. This is consistent with BPA's Power Marketing Program.

C. Changes in Relative Intertie Usage

Summary of Comments

A number of California entities question BPA's summary of experience under the Interim IAP. LADWP challenges BPA's statement that effects of implementation on Intertie loading cannot be directly

evaluated because of lack of knowledge of what the market would have been without the policy. CEC believes that there must be price fixing if no sales of nonfirm energy between California and the PNW have been made below BPA's standard rate while the policy has been in effect. (Nichols, LADWP, Encl. p. 6; Imbrecht, CEC, p. 2.)

LADWP charges that "competition" only exists because BPA's attempt to allocate net scheduling capacity does not work perfectly; if it did, the policy would be totally anticompetitive. SCE states that utilization of its portion of the Intertie reached very low levels in the week of March 4, 1985. (Nichols, LADWP, Encl. pp. 6-7; Kendall, SCE, p. 2.)

Evaluation of Comments

California comments claim decreased Intertie use and blame it on the policy and on unreasonably high PNW prices. As discussed in III.B. above, the prevailing prices under the Interim IAP during the last 4 months of 1984 were not significantly different from 1983 prices, except for BPA. BPA's examination of Intertie usage under the Interim IAP and the findings in the CEC's own reports reveal that the major influence on Intertie use may be factors pertaining to SW loads and resources, such as minimum generation levels.

A minimum generation level is the lowest level at which a generator can be run and still be available to serve load. Many of California's larger oil and gas generators were originally designed as baseload units, not to follow changes in load, and cannot be cost-effectively backed down at night if they must be

available for generation the following day. During low-load periods known as "minimum load conditions," the minimum generation level requirements of a utility may prevent the utility from accepting any purchases of additional energy, even if it is inexpensively priced. As California utilities continue to bring on line new base load thermal plants such as San Onofre and Diablo Canyon, the minimum generation level problems will increase.

The CEC staff report entitled "Integrated Supply and Demand" (September 1984) concludes that operating constraints and competition from very low cost baseload generation limit the ability of the California system to accept Northwest energy. The price of NW energy does not seem to be an important factor in whether it is accepted during minimum load conditions in California. The report attributes the decline in nonfirm imports from the Northwest between 1982 and 1983 to California system constraints. Significantly, there was increased availability of Northwest nonfirm in 1983 when NW imports decreased and the "applicable rate" under the Exportable Agreement was still the spill rate (9 mills/kWh from January until November, 11 mills/kWh in November and December). The CEC expects increased displacement of potential NW imports in the future:

During periods of low load, such as at night, [these] low-cost baseload sources displace imports from the Northwest. The addition of three more nuclear units by 1985 will exacerbate the conflicts between low-cost generation and imported energy. Unless surplus energy delivered during minimum

loads is priced below the variable costs of these units [from about 5 mills/kWh for installed hydroelectric units and about 10 mills/kWh for San Onofre 2 nuclear unit], utilities will have little cause to back them off in order to take imports into the system. The resulting situation for California is that opportunities for imports from the Northwest are at the same time constrained by unavoidable high-cost oil and gas generation needed for peaking requirements, and very low-cost baseload generation. (p. 4-46).

The CEC report issued February 1985 entitled "Minimum Oil and Gas Generation Levels in California Utilities" (hereafter referred to as Minimum Generation Level paper) reports that the increasing use of cogenerators with take or pay contracts also significantly exacerbates California's minimum generation problems.

During 1983, PG&E experienced approximately 2,900 hours (33 percent) of minimum load conditions while SCE experienced 1,800 hours (21 percent) of minimum load conditions, resulting in SCE's rejecting 1,450 GWh of economy energy. (Minimum Generation Level Paper, p. 9.) SCE testimony before the CEC in 1984 established that even with system adjustments, SCE will still reject 1,000 to 3,000 GWh of economy energy annually (Minimum Generation Level Paper, p. 14). The Minimum Generation Level Paper also cites testimony by William Marcus, estimating that 15 percent of the projected gross PNW-PSW Intertie benefits to California would be lost due to minimum-load limitations (p. 15). This indicates that California power system limitations had a significant role in

decreased use of the Intertie during light-load periods under the Interim IAP as well.

The comments received, as well as BPA's Intertie use data (see Table 2), demonstrate that a simple comparison of usage under the policy to past usage is not appropriate. BPA has prepared monthly averages of Intertie loading under the Interim IAP with comparisons to 1983 (Table 2, Item 6). A review of the line loadings month by month reveals no trend of changing usage. It is true, as pointed out by some California utilities, that some portion of the last 4 months of 1983 were marked by abundant hydro conditions in northern California which limited north to south scheduling. It is also true that the late summer and early fall of 1984 was marked by both high temperatures and loads in California. Nonetheless, overall Intertie usage was high under the Interim IAP and showed no sign of a change of loading due to lack of sales under the policy.

SCE gave figures on underutilization of its share of Intertie capacity for March 1985. The stated reason for disuse was that PNW prices were not competitive with SCE's alternative sources of economy energy, which were located outside the PNW. However, March 1985 was a month in which BPA did not have available nonfirm energy. In fact, all NW offers, including BC Hydro, were often not sufficient to fill the Intertie. (See Table 2, Item 9, Condition 3 hours in March 1985.) This would indicate that low loading of SCE's capacity was due to lack of supply from any PNW source, not over-pricing. SCE's example is also inconsistent with the comment that increased BPA prices are to blame for California retail rate hikes. SCE itself pointed out that California purchasers are able to make desired

economy energy purchases from other suppliers. SCE in particular makes major economy energy purchases from the Inland SW. In 1983, SCE purchased over 5,200 GWh. This is expected to increase to over 8,500 GWh by 1989 ("Integrated Supply and Demand," September 1984, CEC, p. 4-138.)

Decision

There has been no trend towards decreased Intertie usage due to the policy. The California economy energy market is much more powerfully affected by the increasing periods of minimum generation conditions than by the IAP.

D. Indirect Sales of BC Hydro Power

Summary of Comments

Both SCE and LADWP find that the Near Term IAP's restriction on extraregional access to the Intertie has resulted in NW utilities acting as energy brokers, purchasing BC Hydro power and selling it at a profit to California. (Kendall, SCE, p. 2; Nichols, LADWP, Encl. pp. 7-8.)

Evaluation of Comments

When BPA proposed to adopt the Interim IAP, California entities criticized the IAP on environmental grounds, suggesting that NW utilities would operate thermal power for export when more environmentally benign hydro power is available from BC Hydro or other utilities. BPA responded by noting that BPA expected secondary markets to develop among BC

Hydro and NW utilities to displace operation of NW thermal resources. This would not increase the amount of overall PNW surplus available for export. (Interim IAP ROD, section II.C, pp. 24-25.) This market has in fact developed. (See EA on Near Term IAP at 4.3.2.2., pp. 44-45.) However, BPA's policy is not to provide access to its share of the Intertie for arbitrage of BC Hydro power.

The IAP does permit a NW utility to buy power from BPA or from other NW utilities to increase its Exhibit B surplus level and its access to Assured Delivery sales over the Intertie while decreasing the Exhibit B surplus of another PNW party. This permits utilities without substantial surpluses to obtain power for export should they choose to do so and may aid in the overall reduction of PNW surplus. (See Interim IAP ROD, section I.B.5., on marketing of regional surplus.) However, NW utilities are not permitted under the Near Term IAP to include purchases of extraregional power for resale to California utilities if this would increase the surplus to be allocated access to the Intertie such that it interfered with marketing of BPA power or decreased the access which BPA and PNW utilities would otherwise have had.

Decision

Contrary to comments received, the Near Term IAP does not provide use of BPA Intertie capacity for arbitrage of extraregional power. Purchase of extraregional power to shut down PNW resources is not prohibited.

IV. Intertie Access in Support of BPA's Power Marketing Program

Summary of Comments

ICA feels that in order for BPA to repay its present obligations to the U.S. Treasury, BPA must reserve enough of its transmission line capacity on its AC and DC lines to be able to market its own firm surplus and nonfirm power to the SW before allowing access to its lines for sales to the SW by other utilities, except utilities who have a partial ownership right to these lines or who have signed an exportable agreement with BPA. Both the PGP and EWEB feel that the Near Term IAP would provide an appropriate means to implement nonfirm rates that are structured using a share-the-savings rate method, especially in light of the Initial Decision from the FERC proceeding on the 1981 and 1982 BPA nonfirm rates. (Miles, ICA, p. 1; Garman, PGP, p. 3; Kunkel, EWEB, p. 2.)

The CPUC argues that BPA's statutory obligation could be successfully carried out by setting rates on the basis of costs actually incurred and by once again providing access to the Intertie for all bilateral transactions entered into between PNW sellers and California buyers. CPUC also states that the IAP is necessarily inconsistent with BPA's statutory obligation and that BPA should recognize that its failure to collect sufficient revenues is principally a function of its refusal so far to base rates charged its extraregional customers on the costs of providing them service. SMUD appreciates BPA's concern with meeting its repayment obligations to the U.S. Treasury, but believes that this concern should be satisfied in the BPA rate proceedings and not through the IAP. PG&E

continues to maintain that rates for power sold by PNW utilities to PSW utilities should be cost-based. (Fairchild, CPUC, p. 2; O'Banion, SMUD, p. 1; Gardiner, PG&E, p. 6.)

CPUC and SMUD again stated that BPA should support its Power Marketing Program by setting rates on the basis of costs actually incurred, instead of by the terms of Intertie access policy. Many California comments stated that BPA should pursue a rate action while other California parties have challenged the IAP before FERC and the Court of Appeals asserting that it is a rate action.

There were general comments from PNW entities that the policy appears to adequately support BPA's Power Marketing Program.

Evaluation of Comments

No new issues were raised regarding the use of the Near Term IAP to support BPA's Power Marketing Program (Interim IAP ROD, pp. 45-56). BPA does set rates in support of the Power Marketing Program. The Near Term IAP performs the separate function of providing use of Federally owned transmission facilities for the marketing of Federal power. The Ninth Circuit has held that the IAP is not inconsistent with BPA authorities and obligations. (*LADWP v. BPA*.)

Decision

The basic structure of the Near Term IAP is consistent with and provides appropriate support for BPA's Power Marketing Program. The success of BPA

rates in fairly allocating and recovering costs will continue to be addressed in the 7(i) and 7(k) processes.

V. Conditions for Intertie Access

A. Existing PNW Resources

Summary of Comments

The AWPPW feels that BPA was not acting in the best interests of BPA or the region by grandfathering Colstrip 4 and Valmy 2 as Existing Pacific Northwest regional resources, but agree it would be rational to include these resources before other extraregional resources. (Bryson, AWPPW, p. 2.)

The OPUC supports BPA's position of including Colstrip 4 and Valmy 2 as Existing Pacific Northwest Resources. (Maudlin, OPUC, p. 2.)

SCL feels the definition for "Existing Pacific Northwest Resource" should be expanded to include resources that were under construction with the intent to be used to carry a utility's load prior to 9/7/84. (Garman, SCL, p. 2.)

Evaluation of Comments

The probable energization dates of Valmy 2 (June 1985) and Colstrip 4 (April 1986) are later than the effective data of the Interim IAP, September 7, 1984, as described in section II.A.7. Construction of these projects started long before BPA considered implementing the IAP. As of September 7, 1984, they were under construction and dedicated to serve NW loads.

Decision

Colstrip 4 and Valmy 2 will be considered as "Existing Pacific Northwest Resources" under the Near Term IAP. These resources were already under construction to serve NW loads as of September 7, 1984. Any resulting surplus is considered in determining the Exhibit B Average Firm Surplus for the owning utilities.

B. Special Provisions for Fish and Wildlife

Issue #1: Clarification of Policy

Summary of Comments

PGE states that "[u]nder the proposed policy, BPA would condition Intertie access on adherence to the Fish and Wildlife Program adopted by the Northwest Power Planning Council." WADOF states that the Near Term IAP should state that any resource granted access "should not incur any unacceptable impacts . . . to the Region's fish and wildlife resources," that the proposed policy's fish and wildlife provisions seem to be a complex way of stating this, but that "the message BPA is attempting to convey regarding fish and wildlife is still unclear." This contrasts with the comments of OPUC, which stated "it was good to see a well-defined process for identifying and evaluating resources which may be operating in a way which harms fish and wildlife." (Dyer, PGE, p. 3; Wilkerson, WADOF, pp. 2-3; Maudlin, OPUC, p. 2.)

Evaluation of Comments

These comments demonstrate that some confusion remains regarding the fish and wildlife provisions of the policy. BPA specifically intends section II.C.3.c. to apply only in the case of adverse impacts on fish and wildlife that increase the need for, or impair the effectiveness of, expenditures or other actions by BPA to protect, mitigate, and enhance fish and wildlife. BPA believes the distinction is clear between an impact that falls within section II.C.3.c. and other fish and wildlife impacts. To fall within section II.C.3.c., there must be a connection between the affected fish or wildlife resources and BPA's expenditures or other actions. For example, a hydroelectric resource exacting excessive mortalities on migrating juvenile salmon would fall within section II.C.3.c. if the juveniles were produced in whole or in part by a BPA-funded habitat improvement project. Similarly, a hydroelectric resource would fall within section II.C.3.c. if the mortalities it caused among migrating salmon or steelhead threatened a fish stock or run which BPA has attempted to or is attempting to rebuild. The same would be true if such a resource exacted excessive mortalities on juvenile salmon produced by a hatchery operated to mitigate FCRPS hydroelectric facilities, because this reduces the effectiveness of BPA fish and wildlife expenditures.

A resource would not fall within section II.C.3.c. if the affected fish or wildlife were unconnected with BPA's expenditures and other protection, mitigation, and enhancement actions. For example, the connection to BPA's activities on behalf of fish and wildlife might be more difficult to demonstrate in the case of a hydroelectric resource which exacted excessive mortal-

ities on migrating juvenile salmon on a stream impacted only by non-Federal hydroelectric projects.

The distinction is also clear between the condition in section II.C.3.c. and the measures in the Regional Council's Fish and Wildlife Program. Section II.C.3.c. turns on the effect of a resource on BPA's expenditures and other actions for fish and wildlife protection, mitigation, and enhancement, not on whether a resource is in compliance with applicable measures in the Fish and Wildlife Program. Under section II.C.7.d. of the proposed policy, a Fish and Wildlife Program measure may have been incorporated into a relevant project license, but BPA denial of Intertie access will be based on noncompliance with the license and the affects on BPA's expenditures and rates actions, not with the Program noncompliance.

In response to the comment of WADOF, impacts to the region's fish and wildlife resources are addressed in the EA and FONSI on the Near Term IAP.

Decision

The policy neither (a) conditions access on a determination that a resource has no adverse impacts on fish and wildlife; nor (b) conditions Intertie access on adherence to the Fish and Wildlife Program adopted by the Regional Council. Instead, the policy provides for the denial of access for a resource which impairs the effectiveness of or increases the need for BPA expenditures for fish and wildlife protection, mitigation, and enhancement under the Pacific Northwest Power Act. "BPA does not believe requiring consistency with the Regional Council's Fish and Wildlife Program for non-Federal resources as a

condition of Intertie access would provide additional benefits without creating unacceptable uncertainty and ambiguity." (Interim IAP ROD, p. 74.) "BPA also believes it is reasonable to defer to FERC and other Federal and state agencies with jurisdiction over resource operations that adversely impact fish and wildlife." (Interim IAP ROD, p. 69.)

Issue #2: Procedures

Summary of Comments

Several commenters object to the presumption contained in section II.C.7.a. of the proposed policy. ICP states that section II.C.7.a. "presumes we have stopped beating our wives unless the Administrator determines otherwise" and that "the arrogance of the provision . . . is an affront to the utilities of the region" Mr. V. David Hocraffer states that the policy should establish a presumption "that compliance by an applicant with the applicable laws and regulations would provide adequate protection for fish and wildlife and the environment." The applicant for Intertie access would have to make a *prima facie* showing of such compliance, after which an interested third party could challenge the presumption. Mr. Hocraffer believes that the proposed Near Term IAP imposes an excessive burden on third parties to identify noncompliance with the fish and wildlife provisions, resulting in the opportunity for noncompliance to go unnoticed. He believes that BPA has a responsibility to "at least require that sufficient factual data be provided to support the initial determination by the Administrator that fish and wildlife . . . is being adequately protected." (Schultz, ICP, p. 5; Hocraffer, p. 2.)

The CRITFC states a related concern:

The policy has allocated the burden of monitoring the Intertie operations for possible fish and wildlife impacts, to tribes and state and Federal fish and wildlife agencies. Without the assistance of the BPA, it will be very difficult for us to meaningfully evaluate changes in river operations engendered by the near term policy, or probable impacts that may result from long term Intertie policies and commitments. (Wapato, CRITFC, p. 1.)

CRITFC goes on to state that it would like to work with BPA to develop "some mechanism for monitoring the fisheries implications of" the policy. IPC also asserts that a procedure is necessary. IPC complains that the fish and wildlife provisions lack clarity, and requests identification of the BPA expenditures and actions referred to by the fish and wildlife provision of the proposed policy. IPC recommends a process under which BPA would analyze each of BPA's proposed expenditures and actions to determine whether they could be affected by the operation of a generating resource in the region, and then take comment from the affected owners or operators. After that, BPA would decide the issue of Intertie access. IPC requests that BPA advise it of any BPA fish and wildlife efforts that are "arguably affected by the operation of" IPC's generating resources. (Wapato, CRITFC, p. 1; Barclay, IPC, Encl. 1, pp. 1-5.)

Evaluation of Comments

BPA believes that it ordinarily may be assumed that compliance with applicable laws and regulations will

provide adequate protection for fish and wildlife, though compliance will not necessarily protect BPA's investments. To date, fish and wildlife agencies have not identified any existing resources subject to regulation which are not currently in compliance. The IAP must anticipate the exceptional case and allow for a challenge of that presumption where access to the Intertie permits operation arguably out of compliance or which adversely affects the Administrator's efforts on behalf on fish and wildlife.

The ICP comment about presumed guilt misunderstands the presumption. The Policy assumes resource operations to be "innocent unless proven guilty."

At the center of the proposed policy is BPA's concern about protecting BPA's substantial and growing investment in the protection, mitigation, and enhancement of fish and wildlife. Even a generating resource which complies with all applicable laws and regulations may increase the need for or impair the effectiveness of BPA's efforts to protect, mitigate, and enhance fish and wildlife.

No resource has been identified which would fall within section II.C.3.c., and it is not practicable to attempt to anticipate the circumstances under which each resource might at some time adversely affect the Administrator's efforts on behalf of fish and wildlife. State and Federal fish and wildlife agencies are in the best position to identify actual adverse effects on fish and wildlife caused by operation of electric power projects, while BPA itself is in the best position to relate those effects to BPA's expenditures and other actions to protect, mitigate, and enhance fish and wildlife.

Decision

The Interim IAP ROD stated that:

If any challenge is raised considering the effects of the operation of an energy resource on BPA fish and wildlife efforts, in appropriate cases BPA will provide resource owners and operators, interested persons and the public with an opportunity to be heard regarding that effect. The challenge shall be made in writing. The determination shall be put in writing. BPA will develop more detailed procedures through notice and comment during the pendency of the Near Term Policy. (Interim IAP ROD, pp. 78-79.)

Prior to denial of access or negotiation of alternative mitigation for a resource, the operation of which has fallen or BPA determines will fall within sections II.C.3.c. or II.C.7. of the policy, BPA will specify the BPA expenditures or other actions which have been or will be affected by operation of such resource.

Issue #3: Relationship to FERC Regulations

Summary of Comments

PNUCC and PP&L assert that the proposed fish and wildlife provisions would conflict with FERC regulations, that FERC regulations adequately cover fish and wildlife matters, and that BPA has the opportunity to protect its fish and wildlife investments by participating in FERC proceedings. For these reasons, PNUCC and PP&L assert that BPA should drop section

II.C.3.c. from the proposed policy. (Snowden, PNUCC, p. 2; Hammerquist, PP&L, p. 2.)

Evaluation of Comments

BPA addressed these arguments in the Interim IAP ROD, which stated:

BPA's proposed Policy provisions give appropriate deference to FERC. They provide that when a resource is not being operated in compliance with applicable law, it will be denied access if it also is adversely affecting the Administrator's efforts on behalf of fish and wildlife.

BPA is not regulating, but is simply effecting public policy decisions about how to rationally allocate a limited amount of space on the Intertie, over which BPA maintains substantial control. BPA does not intend to supplant FERC's role.

BPA does not concede that it has any duty to provide Intertie access to any resource operating in compliance with its FERC license. Even as FERC's regulatory role over resource operations is preserved by the Pacific Northwest Power Act, BPA's role as proprietor of the Intertie is exclusive and not delegable to FERC.

BPA is not willing to defer to FERC respecting which resources will be provided Intertie access, or which resources in their operation may adversely affect the Administrator's efforts on behalf of fish and wildlife. PNUCC argues that if BPA finds that the

operation of any non-Federal projects harms its own fish and wildlife protection efforts, BPA should petition FERC for relief BPA realizes that this avenue exists, and may from time-to-time take advantage of it, particularly in a case where operation of a resource invariably causes or would cause an adverse effect of the Administrator's efforts on behalf of fish and wildlife. However, BPA believes that it has an affirmative duty to utilize its own authorities in a manner that will achieve the purposes of the Pacific Northwest Power Act—in this case, protecting, mitigating, and enhancing fish and wildlife—while acting in a sound, businesslike manner. (Interim IAP ROD, pp. 66-67.)

Decision

BPA believes it is appropriate to protect BPA's significant investment in protecting, mitigating, and enhancing fish and wildlife. BPA also believes it is reasonable to defer to FERC in the manner and to the extent described above. In this way, BPA's role as proprietor of the Intertie will not encroach upon other agencies' jurisdiction over resource operations that impact fish and wildlife. BPA may, however, elect to participate in other agency proceedings, such as those before FERC, to protect BPA's investment in fish and wildlife protection, mitigation, and enhancement. (See Interim IAP ROD, pp. 69-70.)

Issue #4: Conditions for Denial of Access When Seeking Relief from FERC

Summary of Comments

In addition to arguing that BPA should seek relief from FERC rather than to deny access to a resource found to fall within the terms of section II.C.3.c of the proposed policy, PNUCC states that it would "expect BPA not to refuse Intertie access during the period it is seeking FERC relief, unless it reasonably believes there is the threat of irreversible damage to fish and wildlife resources which would result from granting access." (Snowden, PNUCC, p. 2.)

Evaluation of Comments

As stated above, BPA retains the prerogative to seek relief from FERC. In cases where BPA does this, PNUCC would have BPA continue to provide Intertie access for the resource at issue unless there is a threat of irreversible fish and wildlife damage. This assertion misreads BPA's intent in establishing section II.C.3.c. of the proposed policy. BPA's primary purpose is to protect its substantial investment in the protection, mitigation, and enhancement of fish and wildlife, not to supplant FERC's role in protecting, mitigating, and enhancing fish and wildlife. BPA believes that the opportunity for altering operations to reduce adverse impacts, and the opportunity to undertake offsite mitigation not inconsistent with the Fish and Wildlife Program, provide sufficient alternatives in instances where denial of access would otherwise exact high costs on a utility.

Decision

If BPA does seek relief from FERC in instances where the operation of a generating resource increases the need for or impairs the effectiveness of BPA expenditures on other fish and wildlife actions, utilities should expect BPA to protect its investments by denying Intertie access for such resources.

Issue #5: Appropriateness of Special Provisions

Summary of Comments

The Mid-Columbia PUD's [sic] object to the fish and wildlife provisions of the proposed policy on the grounds that they give BPA's fish and wildlife responsibilities special treatment over other obligations of the Administrator under applicable laws, rules, and regulations, and the section II.C.3.a. and b. and II.C.4.b. "provide adequate recognition of all environmentally related obligations of and limitations on the Administrator." (Wright, Mid-Columbia PUD's, p. 2.)

Evaluation of Comments

As stated in the Interim IAP ROD, BPA has determined that the fish and wildlife provisions in the proposed policy are reasonable and appropriate. BPA's investment in the protection, mitigation, and enhancement of fish and wildlife in the Columbia River Basin is large and growing. (Interim IAP ROD, p. 69.) Capital facilities costing over \$500 million are in place or under construction to mitigate adverse effects of Federal hydroelectric development on Columbia River Basin fish and wildlife. BPA is repaying to the U.S.

Treasury the power share of this investment, with interest. In addition, BPA annually reimburses the U.S. Treasury for associated operation and maintenance costs incurred by the Corps of Engineers, Bureau of Reclamation, and U.S. Fish and Wildlife Service. BPA is also incurring a loss of revenue to permit implementation of the Water Budget and the spill passage program as called for by the Columbia River Basin Fish and Wildlife Program and to otherwise accommodate the life cycle of anadromous fish. Recent estimates place the amount of foregone revenues because of the Water Budget under 1985 water conditions between \$54 million and \$74 million. The 1985 Spill Passage Plan is estimated to cost \$49 million in lost revenues.

Sections II.C.3.a. and II.C.3.b. state, in relevant part that BPA will provide Intertie access providing that doing so will not substantially interfere with the operating limitations of the Federal system and will not conflict with the legal obligations of the Administrator. Section II.C.4.d. provides that operating limitations include "the limitations that result from the Administrator's coordination with other utilities and Federal agencies regarding resource and river operations." Including a special fish and wildlife provision does not elevate fish and wildlife issues above other obligations of the Administrator. Instead, it clarifies the IAP to reduce or avoid confusion in its application.

Decision

BPA has determined that it is reasonable and appropriate to include in the policy special provisions addressing the protection, mitigation, and enhance-

ment of fish and wildlife. Rather than elevate fish and wildlife considerations over other considerations, the provisions clarify how BPA will balance its fish and wildlife responsibilities with its other responsibilities.

Issue #6: Applicability Outside the Columbia River Basin

Summary of Comments

WADOF states that the language of the proposed policy appears to apply only to projects within the Columbia River Basin and asserts that it should also apply to projects proposed for development outside the basin. (Wilkerson, WADOF, p. 3.)

Evaluation of Comments

BPA's fish and wildlife program is focused on the Columbia River Basin. However, access under the policy will be available only to "existing Pacific Northwest resources," defined in section II.A.7. to exclude electric power generating resources that are not operational on the date the Interim IAP was issued. Thus, "projects proposed for development," whether within or without the basin, will not receive access under the Near Term IAP.

Decision

Under the Near Term IAP, Intertie access will not be available to any resources which are not included in the definition of existing PNW resources, regardless of where the resource is located.

Issue #7: Applicability to Resources Not Sold on the Intertie

Summary of Comments

WADOF asks "how will BPA determine if the energy being transported is energy from qualifying project? . . . We suggest it may be possible to blend in nonqualifying projects' energy without recognition or penalty." In addition, ICP states that section II.C.3.c. "seems to assume that a project will not kill fish if its output is not allowed on the Intertie" (Wilkerson, WADOF, p. 3; Schultz, ICP, p. 5.)

Evaluation of Comments

The Interim IAP ROD addressed this issue. (Interim IAP ROD, pp. 31-33, 84-85). As stated there, BPA shares the concerns of WADOF and the commenters on the Interim IAP.

Decision

As stated in the Interim IAP ROD:

BPA has added a remedies section to the Policy, indicating a selection of remedies BPA may employ. BPA will require a utility that makes use of the Intertie to provide such information on the resources operating and those used to serve load during given periods as may be requested by BPA. BPA may require this information before or after Intertie schedules are made. The information provided will be made available to the public, unless clearly identified as proprietary with

appropriate explanation. Reports of actual or planned operation will include all the utility's resources, not just those scheduled for Intertie sales. This information could be used to identify amounts of power that should be deleted from a utility's Intertie schedule. (Interim IAP ROD, p. 33.)

VI. Assured Delivery

A. BPA Criteria for Granting Assured Delivery

Summary of Comments

ICP believes it is appropriate to favor transactions which reduce the region's firm surplus, but the two which have to do with selling price (i.e., II.D.1.d.(2) and (5)) are improper. (Schultz, ICP, p. 4.)

PP&L endorses priority disposition of the region's firm surplus over nonfirm surplus, but it does not endorse a higher priority to be granted the sale of firm surplus with call-back provisions over the sale of firm surplus without such provisions. PP&L also states that the Assured Delivery standards which BPA intends to use in its analysis of a proposed firm contract should be fully stated rather than being open-ended and finds some of the evaluation factors to be ambiguous and wonders if BPA will use a weighting scheme in applying the factors. (Hammerquist, PP&L, pp. 1, 3.)

TANC favors reasonable flexibility in the area of Assured Delivery. They also feel that the criteria for Assured Delivery should also be further defined since it appears that other, unspecified criteria could be utilized by BPA. (Pugh, TANC, Encl. p. 1.)

SCL feels that a paragraph needs to be inserted that defines scheduling provisions in general terms and asks that BPA clarify what is meant in section II.C.1 where BPA indicates that "arrangements shall be made regarding operation of the resource during times when Intertie deliveries cannot be made [to the purchaser]." PGP asked that BPA define how schedules for delivery will be established when the available Intertie capacity

is exceeded. (Garman, SCL, pp. 2-3; Garman, PGP, p. 2.)

Mr. Hocraffer believes that all sales at firm prices must be tied to the condition that if Federal investment repayment increases are mandated during the term of access contracts, then a proportional upward adjustment of the contract prices would be made. Also, certain restrictions on Intertie access discussed in II.C.3.a.(2) and II.C.3.b.(1) and (2) are not clear as to what extent an increase in repayment obligation is considered a substantial interference or conflict of the nature referred to in those subsections. (Hocraffer, p. 1.)

Evaluation of Comments

TANC, SMUD, and PP&L requested more defined criteria and standards by which BPA will evaluate requests for Assured Delivery. BPA does not believe that more specific standards are appropriate. The criteria and the evaluation factors BPA intends to use are adequately set out in section II.C. and II.D. of the Near Term IAP.

The conditions for access specified in section II.C.3. impose specific standards, including the avoidance of substantial interference with the Administrator's Power Marketing Program, and the operating limitations of the Federal system, and lack of conflict with the Administrator's existing contractual obligations or other legal obligations of the Administrator. (See Interim IAP ROD for discussions of the Administrator's Power Marketing Program (section III.A.) and of the Fish and Wildlife Responsibilities (section III.D.).)

Section II.D.1.d. of the Near Term IAP establishes evaluation factors that will be applied after a request for Assured Delivery has met the conditions of section II.C. These factors are considerations rather than absolute standards. BPA believes that any request for Assured Delivery must be evaluated on a case-by-case basis, using the clearly specified conditions for access listed in section II.C., and the evaluation factors in section II.D. BPA applies these considerations equitably to all requesters.

TANC and SMUD urge the granting of short term Assured Delivery contracts under the IAP to provide BPA with implementation experience. BPA is doing this and has granted an Assured Delivery contract to Tacoma for a sale to WAPA under the Interim IAP.

BPA believes that the policy adequately describes the parameters for scheduling under the Near Term IAP. BPA does not agree with SCL that there is a need for a more detailed written description of scheduling practices. These are operating matters. BPA has held technical meetings with power scheduling personnel from utilities and has responded to informal inquiries to provide more detailed information on scheduling practices under the Interim IAP.

PP&L's comment that a higher priority should not be granted to firm sales with call-back provisions than to sales without such a provision is a response to a draft paper on the Intertie by the Regional Council staff, in which such a priority scheme was proposed. The Near Term IAP does not have such a provision, although the issue may be raised in the Long Term IAP. BPA would first perform considerable economic analyses on the cost of such a provision, both to the PNW, in the form of reduced selling prices, and to BPA, in the form of

higher residential exchange costs, before such a provision would be included in the draft Long Term IAP.

The ICP favors those criteria for Assured Delivery which pertain to reducing the region's surplus (II.D.1.d.(1)), but objects to including criteria that have to do with asking price. The ICP maintains that if a contract is truly firm, replacement of the firm energy portion with nonfirm energy is merely a price reduction and has no effect on other parties' nonfirm allocations. However, the purpose of the criterion was to preserve the advantage of Assured Delivery for those sellers who contracted for firm sales. The ICP suggestion would result in an unwarranted advantage to one seller compared to others which are marketing the very same economy energy product.

As discussed above, the criteria in section II.D.1.d. are evaluation factors, not absolute indicators. As discussed in section IV.B.1. of the Interim IAP ROD, BPA intends to apply these evaluation factors to ensure that contracts receiving Assured Delivery are not merely advance arrangements to sell nonfirm power. For this purpose, it is appropriate to evaluate the extent to which the selling price is subject to daily fluctuations and the extent to which the buyer has the right to displace purchases under the contract with nonfirm energy.

BPA agrees with SCL's comment that section II.D.1.h. is unclear, and BPA had added clarifying language. The intent of the section is that if there is a catastrophic reduction in Intertie capacity resulting in BPA firm deliveries and other utilities' Assured Deliveries exceeding available Intertie capacity, the NW and SW parties affected will establish delivery

schedules. Such a reduction in Intertie capacity could be due, for example, to an outage on one of the Intertie lines. It is standard operating procedure that if such a reduction were to occur, the California buyers who have the right to receive the power, not BPA, would be the parties to allocate the reduced deliveries. BPA therefore does not agree with PGP's comment that the Near Term IAP should describe how BPA will establish schedules under section II.D.1.h.

Decision

BPA will retain the criteria and evaluation factors for granting assured access, but will clarify language in section II.D.1.h.

B. Exhibit B as an Upper Limit

Summary of Comments

PGE agrees with the concept of limiting Assured Delivery to an amount no greater than the utility's Average Firm Surplus, as contained in Exhibit B. But if BPA is going to recompute a utility's Average Firm Surplus submittals, then the methodology BPA intends to use should be included in the policy. PGE feels that an additional ceiling should be placed on the total Assured delivery granted to all scheduling utilities. (Dyer, PGE, pp. 2-3.)

OPUC agrees with BPA that the issue of granting firm Intertie access to an amount greater than the utility's annual Average Firm Surplus is a problem and deserves substantial consideration. It also feels that new firm sales which exceed the utility's annual Average Firm Surplus should not be granted firm

Intertie access. They encourage BPA and other parties to study the issue of granting firm Intertie access to an amount greater than the utility's annual Average Firm Surplus so that a policy can be implemented which is in the best interest of all PNW constituents. (Maudlin, OPUC, p. 2.)

The ICP feels that it is improper to limit any utility's assured access to an amount of energy determined by BPA to be that system's firm surplus, especially by a unilateral and undefined process. Furthermore, it is unreasonable to limit hourly Assured Delivery to an average energy quantity. (Schultz, ICP, pp. 3-4.)

PNUCC feels that a technical problem exists in limiting hourly deliveries to the annual averages shown in Exhibit B. If a NW utility was making a firm sale from a thermal plant or a shaped sale, it could never hope to achieve its annual average if limited to that average on an hourly basis. Averaging zero output with full capacity and then limiting hourly output to that average in Exhibit B is simply unworkable. In the case of the shaped sale, such hourly limits are also unworkable. (Snowden, PNUCC, p. 2.)

PGP feels that with respect to deliveries over the Intertie which exceed the Average Firm Surplus, it suggests that delivery be permitted by requiring utilities to designate the seasonality or diurnal character of the surplus. (Garman, PGP, p. 1.)

The PNGC suggests that for sales made from specific resources where there is a substantial minimum purchase commitment by a SW party, the selling utility should be allowed Assured Delivery rights up to the capability of the resource in all months until the minimum purchase obligation is satisfied. PNGC finds a technical flaw in limiting Assured

Delivery rights on any hour to a utility's annual Average Firm Surplus, particularly if a sale is being made from a specific resource. While not a significant problem in those months where BPA allows a delivery rate up to 1.8 times a utility's Average Firm Surplus, in all other months this could severely limit the amount of energy a utility is able to sell on a firm basis. (Nadal, PNGC, p. 2.)

PG&E claims that limiting Assured Delivery to firm energy levels would cripple PG&E's and other PSW utilities' ability to obtain the benefits of capacity, as well as energy, over the Intertie. (Gardiner, PG&E, p. 4.)

Tacoma notes shortcomings in the policy's ability to truly provide "assured" access for firm contract sales. These shortcomings stem from the allocations arrived at in Exhibit B. Tacoma recommends one or more of the following revisions be made to footnote 2 of Exhibit B to better reflect seasonality of firm surplus: (1) allow a 1.8 multiplier for any period of five consecutive months between June and December; (2) allow utilities to increase firm surplus in a given year by purchasing surplus firm from BPA or a PNW utility; and/or (3) where an existing contractual sales obligation must be fulfilled, allow for waiver of Exhibit B limits if the contractual obligation does not exceed 1.8 times the firm surplus amount for a portion of the operating year. (Thompson, Tacoma, pp. 1-2.)

Evaluation of Comments

All comments except those of the ICP generally recognized the principle that Assured Delivery should be limited in some way to the utility's firm surplus.

Most criticisms concern flexibility for shaping of firm energy deliveries into heavy load hours or seasons. The Tacoma and PNGC alternatives would give Assured Delivery for the hourly delivery levels desired for certain specific transactions of those parties. BPA's position in the Interim IAP was to use the Exhibit B upper limit for the dual purpose of maintaining parity among customers based on their relative surpluses and to preserve a reasonable amount of the Intertie for nonfirm sales. The shaping of firm energy sales would, of course, remove that capacity from the nonfirm allocation process.

Decision

Exhibit B Average Firm Surplus levels will continue to be hourly upper limits for Assured Delivery. For all qualifying contracts of a Scheduling Utility, annual Assured Delivery access may not exceed the lesser of total take or pay energy under such contracts or the utility's total energy surplus.

C. Exhibit B - Details of Average Firm Surplus

Summary of Comments

PGP, PGE, SCL, PP&L, and IPC ask that BPA explain how BPA determined the amount of each utility's firm surplus as shown in Exhibit B and that the data contained in Exhibit B be explained more fully. (Garman, PGP, p. 1; Dyer, PGE, p. 3; Garman, SCL, p. 2; Hammerquist, PP&L, p. 2; Barclay, IPC, Encl. p. 7.)

The IPC feels that the information they submitted to BPA on Exhibit I does not conform with the

information shown in Exhibit B. (Barclay, IPC, Encl. p. 7.)

SCL states that in calculating the Average Firm Surplus, a utility's firm wheeling rights for the Intertie under other contracts should be taken into account and subtracted from the Average Firm Surplus to determine the upper limit of assured access. (Garman, SCL, p. 2.)

Puget feels that the changes made to Exhibit B in the proposed Near Term IAP did not allay their concern that the methodology used to determine Exhibit B values is flawed. (Bailey, Puget, p. 1.)

The IPC objects to BPA's method of determining Assured Delivery for firm contracts by determining a utility's annual Average Firm Surplus based on critical water since the IPC plans on median water conditions. (Barclay, IPC, Encl. p. 4.)

Douglas specifically asks that BPA delete the energy listed under 1985-86 and 1986-87 operating years for them since they are not allowed to export energy outside of their service area. (Einarson, Douglas, p. 1.)

Evaluation of Comments

BPA intends to provide complete information on the technical development of Exhibit B amounts, both formally and informally, in response to requests. To answer some of the basic questions raised in the comments, BPA has available a staff paper describing the development of Exhibit B amounts. Exhibit B now contains a description of the general sources of the information.

The most serious challenge to BPA's method of determining Exhibit B amounts came from the Idaho

Power Company, who argued that they be allowed to calculate their firm surplus based on median water resource planning criteria. BPA's intent under the Interim IAP was that Exhibit B amounts would be upper limits for Assured Delivery in order to provide equitable access for all PNW utilities and to provide reasonable access for secondary energy. If the Exhibit B amounts for utilities were not calculated on the same planning basis, this equitable balance would be upset. Moreover, uniform use for all utilities of median water planning as a basis would be inconsistent with utility obligations under the Coordination Agreement to have sufficient resources available to serve firm loads under critical water.

Decision

BPA expects the Exhibit to be dynamic with utility surpluses subject to change from time to time. If appropriate, Exhibit B levels will be recalculated to reflect technical corrections to the firm energy capability of resources or firm loads based on updated information. Exhibit B now contains information as to the general sources of the information. Since Idaho Power Company is the only PNW utility using the median water planning criteria, BPA has determined its Exhibit B surplus using critical water assumptions so that all Exhibit B amounts are developed on a comparable basis.

D. Assured Delivery for Capacity and Exchange Contracts

Summary of Comments

PG&E states that the proposed criteria for Assured Delivery have a major flaw in that the criteria appear to exclude capacity transactions. BPA should not foreclose the benefits of capacity exchanges and sales merely to protect its control of the nonfirm energy market. Both TANC and PG&E believe that firm capacity exchanges would be mutually beneficial to the PNW and California and should receive Assured Delivery under the Near Term IAP. (Gardiner, PG&E, p. 4; Pugh, TANC, Encl. p. 1; Gardiner, PG&E, p. 4 [sic].)

SCL agrees that seasonal exchange agreements should receive Assured Delivery, but also stipulated that nonfirm energy should not be moved under this or any other Assured Delivery arrangement. Two respondents, Grant and ICA, suggest specific terms that should be included in any capacity/energy exchange arrangements. PP&L believes that the disposition of the region's energy, not its capacity, is the purpose of the Near Term IAP. Capacity exchanges should not necessarily be discouraged, however, if the energy is returned within the day or week. (Garman, SCL, p. 2; McMahan, Grant, p. 1; Miles, ICA, p. 2; Hammerquist, PP&L, p. 3.)

Evaluation of Comments

In the Interim IAP, BPA recognized the importance of access for both firm and nonfirm energy by providing Assured Delivery for firm sales, but limiting

the capacity devoted to firm sales by means of the Average Firm Surplus levels contained in Exhibit B. In this way, Intertie access was retained for the sales of nonfirm energy which form a significant part of BPA's Power Marketing Program and which are an important historic use of the Intertie. Under present conditions of surplus, the firm and nonfirm energy from already existing PNW resources is great enough to fill the Intertie during most periods. This is demonstrated by the relatively small number of hours during which Condition 3 was in effect under the Interim IAP. (See Table 2.) BPA expects this surplus to continue through the term of the Near Term IAP.

BPA's criterion for Assured Delivery in Section II.D.1.c.(2) is that the contract must be a sale of firm power, not merely an advance arrangement to sell nonfirm energy. This will preserve Assured Delivery for BPA and PNW utilities selling firm surplus. All utilities selling power on a nonfirm basis should be granted access on the same footing, i.e., under formula allocations. Assured Delivery should not be used to give one nonfirm seller an advantage over others.

Deliveries of capacity without the concurrent sale of firm energy and capacity exchanges do not result in the decrease of a firm energy surplus. Deliveries of capacity without energy may create a nonfirm energy market for the replacement obligation, but this market will only bring about the sale of nonfirm energy during light load hours or offpeak seasons. The utility supplying the capacity does not realize a net decrease in its average energy surplus though it may move the surplus to a different period. The advantage of diversity exchanges lies in the deferral of capital expenditure for new resources. The PNW will need no

new resources until the late 1990's. Exchange capacity or energy will have low values in the PNW until dissipation of PNW surpluses in the late 1990's. Likewise, diversity capacity or capacity/energy contracts do not reduce the supplier's firm energy surplus, they merely change its shape within an operating year. In the case of capacity exchanges, BPA's power marketing to its firm power customers in the PNW might be impacted by the return of capacity or energy.

Near term Intertie access priority for energy sales is prudent because sales of firm or nonfirm energy can benefit BPA's Power Marketing Program in a number of ways. A utility is more likely to receive a price closer to its fully allocated costs by selling firm energy than by selling capacity. BPA has received comments in a variety of forums urging that power sold to California be at fully allocated cost. Advantageous energy sales to California by PNW utilities will benefit these utilities' Average System Cost. This could in turn reduce costs to BPA if that utility has a Residential Exchange contract with BPA. Also, a reduction if the regional firm energy surplus held by other NW utilities might benefit BPA's PNW markets.

In formulating the Long Term IAP, BPA will again examine the issue of capacity sales and exchanges. Most of the current PNW-PSW capacity energy exchange contracts expire before 1990. Also, as new base load thermal plants come on line in the PSW, the structure of the California market may change such that economy energy may no longer enjoy as favorable a market as it has historically. While capacity exchanges are generally not particularly beneficial to the PNW with its long term surplus, seasonal exchanges with California may become desirable

transactions as the PNW enters a period of load/resource balance in the mid-1990's.

Decision

Intertie access will be provided for the sales of regional firm energy surplus while providing the remaining Intertie capacity for sales of nonfirm energy. New sales of capacity or capacity/energy exchanges will not be granted Assured Delivery under the Near Term IAP to the extent they exceed the PNW party's Exhibit B level. BPA will reevaluate the issue of capacity sales and exchanges when developing the Long Term IAP.

E. Need for Assured Access for Firm Transactions

Summary of Comments

SMUD does not feel comfortable contracting with suppliers in the NW or foregoing development of other resources when transmission access provisions are unknown. SMUD and TANC feel that BPA should offer short term firm transmission contracts consistent with the principles described in the IAP in order to gain further experience with the Near Term IAP. (O'Banion, SMUD, pp. 2-3; Pugh, TANC, p. 2.)

CEC believes that the uncertainty created by the IAP with regard to Canadian sales and other long term contracts puts California utilities at a severe disadvantage in integrating power purchase contracts into their long term resource plans. (Imbrecht, CEC, p. 3.)

OPUC states that any firm power sales contract which qualifies for firm Intertie access under the Near

Term IAP should continue to have firm access for the duration of the power sales contract. They also recommend that firm access to the Intertie be guaranteed for the length of the firm sale as long as the firm sale is of a duration greater than 1 year as BPA has proposed. (Maudlin, OPUC, p. 2.)

PG&E believes that the limitations on the term of Assured Delivery would impose significant burdens on utilities desiring to contract soon for firm purchases or sales extending beyond September 30, 1986. Also, BPA should "grandfather" guaranteed firm access for the term of any contracts that meet the IAP's Assured Delivery criteria, so long as these contracts do not substantially impair BPA's possible implementation of a Long Term IAP. (Gardiner, PG&E, p. 5.)

The AWPPW has a serious concern that the orderly development of the IAP and the allocation of its quotas for "Assured Delivery" not be preempted by a settlement agreement of the WNP- 3 litigation, based on priority Intertie access of the power given IOU's as redemption. (Bryson, AWPPW, p. 2.)

WWP feels that the stipulation that new Assured Delivery contracts cannot be in effect longer than the Near Term IAP makes it impossible for NW utilities to secure long term agreements with the SW in the interim. (Prekeges, WWP, p. 2.)

PP&L stresses the economic importance of long term firm sales commencing prior to the scheduled expiration date of the Near Term IAP. They feel that failure to accommodate this concern will result in an irrecoverable loss of revenue to the region because the Near Term IAP effectively requires the region's firm surplus to be sold at nonfirm prices rather than at

prices approaching fully distributed cost.
(Hammerquist, PP&L, p. 2.)

Evaluation of Comments

The comments generally stress the desire for long term certainty for Intertie transactions. The OPUC and PP&L comments point out the need to make long term sales in order to make the most cost-effective disposition of surplus firm resources.

BPA shares the concern of both PNW and PSW parties regarding the need for provisions for long term transmission access on the Intertie. However, BPA cannot promulgate a policy for general application to long term arrangements in advance of the environmental analysis which is being undertaken in connection with the Long Term IAP. BPA will not make case by case decisions in favor of Intertie access for individual long term transactions in advance of general policy, because of the need for equitable treatment of all parties.

Decision

The Near Term IAP will provide access for firm contracts through its effective period.

VII. Formula Allocations

A. General Methodology

Summary of Comments

The AWPPW compliments BPA for conforming to BPA's legal responsibilities in honoring the Exportable Agreement. (Bryson, AWPPW, p. 1.)

The PGP suggests that nonfirm access be provided to the signers of the Coordination Agreement and that such access be calculated by comparing resource capability under critical water planning with resource capability under median or expected waters. (Garman, PGP, p. 2.)

EWEB and PGP believe that BPA should continue to secure a portion of the Intertie for the movement of nonfirm energy because of the overriding impact that nonfirm sales had in justifying its construction. Additional firm access should only be provided when Intertie expansion takes place. The PGP also feels it is appropriate to grant nonfirm access priority in light of the Region's coordinated operations and critical water planning. (Kunkel, EWEB, p. 1; Garman, PGP, pp. 1-2.)

Evaluation of Comments

Most comments were in favor of a recognition of the status of nonfirm energy on the Intertie. Some comments suggested that further protection was needed to prevent nonfirm energy sales access from being diminished in favor of access for surplus firm sales. The IAP strikes a balance between firm and

nonfirm energy by limiting hourly levels of Assured Delivery to the Exhibit B surpluses of scheduling utilities.

The PGP suggested that BPA should provide access to signers of the PNW Coordination Agreement and that nonfirm access be calculated by comparing resource capability under critical water conditions with that under median water conditions. Currently, nonfirm access is provided to all signers of the Exportable Agreement, which includes the Idaho Power Company, a nonsignatory of the Coordination Agreement. This comment appears to assume that the current declaration procedure results in inferior allocations for nonfirm and that nonfirm sellers should receive a level of access based on their secondary energy capabilities on a planning basis. However, BPA's experience has indicated that the declarations of PNW parties for the formula allocation process have been fair. The declarations include amounts of power that the scheduling utility could reasonably have supplied if called on to do so. BPA believes that declarations based on actually available nonfirm energy are more equitable than the granting of nonfirm access allocations based on each utility's relative ability to generate nonfirm energy.

Decision

The formula allocation process will be continued in the Near Term IAP in the same form as the Interim IAP. The present formula allocation process recognizes the importance of Intertie access for nonfirm energy and provides a fair method for declarations of available energy by all PNW scheduling utilities.

B. BPA Guaranteed Sales

Summary of Comments

PP&L, WWP, and SMUD feel that BPA should apply the IAP principles to itself, as well as to NW utilities. WWP states that utility and BPA contracts should be subject to meeting the same qualifying conditions in section II.D. for the sake of consistency and fairness. Puget and PGE state that BPA violated the IAP by allocating to itself additional Assured Delivery capacity in an amount equal to sales of BPA guaranteed nonfirm energy. This was done in spite of the fact that Assured Delivery capacity was supposed to be reserved for firm energy according to the IAP. (Hammerquist, PP&L, p. 1; Prekeges, WWP, p. 2; O'Banion, SMUD, p. 2; Bailey, Puget, p. 1; Dyer, PGE, p. 2.)

PGE requests that if there are certain features of the IAP which are more subject to change or are subject to change given certain marketing conditions, that the rules be set out in the revised IAP. PGP asks that some additional language be included which describes the "New contracts for which BPA claims Assured Delivery." (Dyer, PGE, p. 2; Garman, PGP, p. 2.)

Evaluation of Comments

The comments received asserted that BPA should receive Intertie access only in accordance with the IAP procedures which apply to wheeling customers. The sole instance described involved BPA's preemption of some Intertie capacity which would otherwise have been available for nonfirm wheeling of formula allocations in order to deliver BPA guaranteed nonfirm

energy to a California buyer. There was no impact on Assured Delivery.

BPA's guaranteed nonfirm energy is nonfirm energy which is guaranteed to be available for a period of days. It is sold under the NF rate schedule at a higher price than nonguaranteed nonfirm energy. Once BPA has arranged for such a sale, it is a Federal obligation under the terms of BPA's rate schedules.

The comments raised concern[s] about BPA's use of the Intertie during Condition 2 to ensure transmission of its guaranteed sales of nonfirm energy in amounts greater than its allocation. These concerns were directed to an implementation practice which the commenters felt had not been adequately described by BPA and which was beyond the principles described in the IAP. The Near Term IAP clearly expresses the right for BPA to reserve sufficient Intertie capacity to support its Power Marketing Program and contractual obligations (see Near Term IAP section III.C.3.). (See the recent Ninth Circuit ruling (*LADWP v. BPA*) upholding BPA's authority to accord first preference to transmission of Federal power.) The prearranged contractual obligation to maintain guaranteed nonfirm deliveries falls within this right.

In the application of the Interim IAP, BPA developed and advertised many specific implementation practices. The practice at issue had been discussed with interested parties as a possible mechanism for dealing with a rapidly changing resource condition on the Federal system. As an alternative, BPA could have continued to make large declarations with subsequent allocations large enough to continue the guaranteed nonfirm sales. The Federal system could easily have supported those declarations, and the impact on other

NW parties' allocations would have been greater. The method chosen was judged to be the fairest available.

BPA does not expect to use this mechanism frequently. BPA will continue to implement the policy with consideration of the impacts of the procedure used on other parties. Discussions will also continue with both NW and SW parties on implementation practices.

Decision

BPA will use additional Intertie capacity, if necessary, to serve a Federal obligation, but will not pre-empt Assured Delivery which has already been approved for qualified wheeling customers.

VIII. Economic Override

Summary of Comments

PG&E feels that adoption of a price ceiling arrangement would provide protection against price-gouging and would address the legitimate needs of both regions by also promoting full use of the Intertie, and would alleviate some of the most pernicious impacts of the IAP's nonfirm market allocation mechanism. The economic override feature of the nonfirm market allocation mechanism provides no real protection for PSW purchasers and either should be removed or replaced with a mechanism to ensure that PSW utilities receive an equitable share of the net benefits. Instead of an economic override provision, the IAP should contain a provision for a value-based price ceiling. By requiring a prospective purchaser to show that an offer is uneconomic for *all* PSW utilities, BPA

may be inviting these utilities to incur antitrust liability as a result of the exchange of sensitive cost information with at least a potential impact on competition. (Gardiner, PG&E, pp. 2, 5, and 6.)

In an effort to fully utilize all portions of the Intertie, Grant proposes that at the close of each normal work day, all unscheduled capacity should revert to BPA to be used by all parties in making "real time" sales. Parties wishing to use this capacity would notify BPA that they had a sale pending at least 1 hour prior to the scheduling hour. BPA would then allocate this unused capacity in the same proportion as prescheduled allocations. (McMahan, Grant, p. 2.)

LADWP recommends that BPA incorporate an economic override provision that would simply require a requesting utility to declare its most expensive alternate energy source which can be displaced. (Nichols, LADWP, Encl. p. 9.)

SCE disagrees with BPA's view that the economic override mechanism will protect the PSW from excessively high sales offers from the PNW. SCE believes that economic override is nothing more than a mechanism to provide additional price protection for nonfirm energy sold by PNW utilities. SCE objected to this provision when first proposed by BPA and objects to the inclusion of this mechanism in the Near Term IAP. (Kendall, SCE, p. 2.)

PG&E also feels that the Interim IAP's nonfirm market allocation mechanism did result in Intertie capacity going unused because a PNW seller would not offer available surplus energy at a price economic to the PSW. (Gardiner, PG&E, p. 3.)

TANC feels that specific mechanics and the rationale for the economic override appear to be

inadequately defined. It felt that the burden of proof should not be placed on buyers, but rather should be based upon free market determinations. (Pugh, TANC, Encl. p. 1.)

LADWP feels that it is unreasonable for the California utility which seeks economic override to prove to BPA that the price quoted by an entity with an allocation is uneconomic for "any other Southwest Utilities." Also, LADWP believes that the time required to establish schedules under this procedure renders the provision practically worthless. To the extent that the revised policy will interfere with natural market forces, LADWP recognizes the need for a workable economic override provision which would assure that economic transactions take place in a manner which would not interfere with the schedulers' and dispatchers' ability to operate effectively their respective systems. (Nichols, LADWP, Encl. p. 9.)

SMUD does not understand why the purchasing SW utility would also have to show that the offered price is not economic for any other SW utility. To the extent that the economic override provision allows at least some consideration of the purchaser's needs, SMUD supported the economic override. (O'Banion, SMUD, p. 2.)

Many PNW utilities believe that the Economic Override provision should be eliminated from the policy. (Einarson, Douglas, p. 1; Dyer, PGE, p. 3; Prekeges, [WWP], p. 2; Hammerquist, PP&L, p. 3.)

ICP believes that the Economic Override provision as drafted by BPA, does not appear to be objectionable, but unless the California parties really believe it is necessary for their protection, it prefers to have it omitted from the Near Term IAP. The ICP suggests

that a kW-year demand rate for firm Intertie wheeling would tend to be self-policing, because it would discourage a utility from renting a quantity of Intertie capacity in the speculation of selling more nonfirm energy than it could sell under the allocation procedure. ICA suggests that BPA charge a penalty, at least equal to its KWH/Wheeling charge, for any reserved transmission line capacity not used by the utility reserving the transmission line capacity. (Schultz, ICP, pp. 2 and 4; Miles, ICA, p. 2.)

SCL supports the override provision as written. (Garman, SCL, p. 3.)

Evaluation of Comments

No new issues were raised in the comments, but some new alternatives were proposed. One alternative was to impose a disincentive against failure to use an Intertie allocation by means of transmission charges based on the allocated amount. Another alternative was to adopt an Intertie price ceiling. Yet another was to reallocate unused capacity from the preschedule period for use in making "real time" sales.

California utilities generally repeated objections that the proposed provision was a poor substitute for the conditions which prevailed prior to the Interim IAP when PNW sellers had no assurance of Intertie capacity on which to bargain for sales. However, some PSW comments indicated a qualified interest in some mechanism to safeguard against capture of Intertie capacity by power which was too expensive for the buyers.

Most California comments completely reject the economic override concept. This poses a dilemma:

California parties charge that the IAP protects allocations for unaffordable offers, but yet California utilities are unwilling to provide information as to the price levels which are affordable.

There was also objection to a requirement that the would-be purchaser demonstrate that other purchasers could not afford the offered PNW price. It is reasonable to recognize that a SW utility could not account for the economics of all other SW utilities.

A major subject of criticism from both PNW and PSW entities was the workability of economic override. It was pointed out that it would be impossible to process all necessary information in the short time frame in which nonfirm scheduling is carried out. It was considered unrealistic to require one utility to account for the price which could be afforded by other potential buyers. The comments regarding the workability of economic override were generally well-taken. It would be impracticable to create a mechanism which could be applied hourly in the short time frames of energy scheduling. The alternative proposed by Grant, for example, is not practicable for use in real time scheduling of energy transactions because of the re-allocation process it would involve.

BPA's experience under the Interim IAP indicated that Intertie usage was so high as to cast doubt on the need for an economic override of allocations. This was referred to in BPA's EA on the Near Term IAP. BPA also pointed out in the Discussion section of the draft Near Term IAP that BPA's implementation practices for allocations provide an additional incentive for competitive sales practices. Intertie allocations are distributed over a high estimate of available Intertie capacity, such that sellers will have to be responsive to

the market in order to gain sales. However, the existence of a safeguarding provision such as economic override might be valuable in the future to preserve optimum usage.

Decision

BPA will not include a provision in the Near Term IAP for economic override. However, BPA will monitor Intertie activity during the term of the Near Term IAP. If it appears that an economic override provision would be appropriate in order to provide optimum use of the Intertie, consistent with BPA's duty to allocate Intertie capacity and with BPA's intent to achieve a balance of benefits, BPA will propose an amendment to the Near Term IAP to accommodate economic override. The comments received so far will be considered for such proposed amendment, if offered.

IX. Extraregional Access

Summary of Comments

PNUCC believed that the bulk of the benefit in the NW resulting from this IAP results from the limitations on extraregional access. They support rights afforded extraregional utilities under the Interim and Near Term IAP as being appropriate. (Snowden, PNUCC, p. 1.)

TANC members prefer BPA to adopt more flexible extraregional Intertie access provisions particularly in the Long Term IAP. TANC feels that BPA should begin to plan for those time periods when extraregional

transactions will not conflict with PNW interests. (Pugh, TANC, Encl. p. 1.)

The AWPPW extends compliments to BPA for prioritizing regional non-Federal existing resources for Assured Delivery of surplus power ahead of extraregional sources. (Bryson, AWPPW, p. 1.)

ICA feels that all NW utilities must have access to BPA's transmission lines before BPA allows BC Hydro access to these lines. (Miles, ICA, p. 1.)

The ICA feels that power generated from extraregional resources dedicated to regional load and sold to the SW by IOU's should be transmitted to the SW over their own transmission lines or by interconnection with another IOU line, if possible, before BPA allows access to its lines for these sales to the SW. (Miles, ICA, p. 1.)

ICP believes that the IAP provisions on extraregional access are important to the success of the policy. (Schultz, ICP, p. 2.)

SCL supports the concepts of offering extraregional access in return for considerations under the Coordination Agreement. (Garman, SCL, p. 3.)

PG&E feels that BPA has been candid not only about the increased revenues it is extracting from California consumers but also about the profits it and other PNW utilities are getting from "pass-through" or "indirect" sales of Canadian energy. (Gardiner, PG&E, pp. 3-4.)

PG&E feels that the result of restricting extraregional access, merely in order to serve as a totally unneeded broker, most clearly illustrates the predatory intent of the IAP. (Gardiner, PG&E, p. 4.)

PP&L agrees that extraregional access should be granted only when demonstrated economic benefits

will accrue to the NW region. Further, there must be a clear demonstration that such economic benefits occur in both the short term and long term. (Hammerquist, PP&L, p. 3.)

EWEB supports BPA's policy of extraregional access to the Intertie in return for consideration under the PNW Coordination Agreement, provided that net benefits to the NW are not reduced by such transactions and that BPA and other NW utilities maintain priority use on the northern portion of the Intertie. EWEB feels that at no time should sales from extraregional utilities have a detrimental effect on BPA or other NW utilities. When extraregional sales are allowed, the extraregional utility must be required to pay all associated costs related to such transactions. (Kunkel, EWEB, p. 2.)

CEC feels that it is important to note that BC Hydro sales to California were dramatically reduced by the IAP. (Imbrecht, CEC, p. 3.)

Extraregional access should require quantitative proof that benefits of increased coordination will at least match loss of PNW revenues resulting from Intertie access traded for it. Conditions under Near Term IAP should be used as status quo in this calculation. (Schultz, ICP, p. 3.)

Evaluation of Comments

No issues were raised in these comments which were not treated in the Interim IAP ROD. (pp. 95-98.) The propriety of reserving Intertie use for Federal Power based on Federal investment, and for PNW power based on the responsibility of PNW utilities as ratepayers for the cost of BPA's transmission system,

was explained in the Interim IAP ROD and was upheld in *LADWP v. BPA*.

BPA met with BC Hydro regarding the possibility of further Intertie Access for the 1985-86 operating year. The discussions were recently discontinued due to lack of substantial agreement. The parties agreed to exchange data and study alternatives.

The recent Ninth Circuit decision upholds BPA's authority to provide access to Federally owned transmission facilities in a manner that accords access first for transmission of Federal power and then access for other power generated in the PNW. Once these preferences are met, BPA cannot deny access to the Intertie to other extraregional utilities within the U.S. BPA is permitted, but not required, to provide access for Canadian generated power.

BPA believes the Near Term IAP to be consistent with this priority scheme. BPA considered, but chose not to include, provisions that differentiated between extraregional U.S. utilities and extraregional non-U.S. utilities. BPA believes that access under both the Interim IAP and the proposed Near Term IAP is consistent with the Court's decision, and that language modifications are not required. If a policy issue concerning priority between extraregional U.S. utilities and Canadian utilities arises while the policy is in effect, the question will be resolved in accordance with the Ninth Circuit decision.

Decision

Intertie access will be provided for Canadian utilities and resources only to the extent that Intertie capacity is not needed for marketing of BPA surplus, the

surplus from other PNW suppliers, or other U.S. resource surplus. BPA will consider further access for Canadian utilities if agreement can be reached regarding additional coordinated operations with the Federal Columbia River Power System. BPA is continuing to meet with BC Hydro on these matters.

X. Remedies and Enforcement/Verification

Summary of Comments

In the current wording of Section II.F: Remedies, BPA determines if a utility is in noncompliance with the policy and whether to apply a remedy. PGE believes that there should be some vehicle for airing a scheduling utility's side of the story, as well as a way to appeal remedies which the scheduling utility feels are excessive. (Dyer, PGE, p. 1.)

SCL feels it is improper for BPA to impose a prospective remedy for noncompliance with the policy. A utility should be given a chance to correct its action. If remedial action is necessary, it should be tied to access that a utility has to the Intertie. (Garman, SCL, p. 3.)

PP&L feels that the provisions of section II.C.6. to verify consistency with the policy must not require utilities to submit proprietary information to BPA. (Hammerquist, PP&L, p. 3.)

The PGP suggests that a monthly BPA report of Section II.D.2.: Formula Allocation Methods, would better equip BPA in its policy enforcement efforts and in developing its Long Term IAP. This would eliminate most of the reasons for remedies. EWEB urges BPA to develop a method of spot checking the declarations of

utilities. A utility should be required to meet its entire declaration at all times. BPA should develop an enforceable disincentive that would discourage users of the Intertie from inflating declarations. EWEB also urges BPA to develop a methodology whereby strict regulation of transfers would occur to prevent the displacement of firm, resource-specific allocations by any nonfirm transactions. (Garman, PGP, p. 2; Kunkel, EWEB, p. 1.)

Evaluation of Comments

The comments ranged from criticizing the remedies and enforcement measures as being too strict to suggesting that they are not rigorous enough to be effective. BPA has instituted a spot check procedure for use when a declaration appears to be unrepresentative of known resource conditions. During the term of the Interim IAP, BPA has called utilities and requested a list of the energy resources used to support the declaration. As mentioned in the discussion on formula allocations, the declarations approved by BPA for access to BPA's capacity could reasonably have been supplied from available resources of the utility.

Decision

BPA's enforcement methods and remedies for noncompliance are sufficient and appropriate under the circumstances. BPA will provide a utility the opportunity to present its perspective prior to any final decision on an enforcement method or remedy. No formal procedure will be created. Prospective remedies may be called for if noncompliance has not been discovered until after it has occurred, particularly if

the action had an adverse impact on BPA or other scheduling utilities who should be made whole. BPA will insist that all necessary information be provided if requested under section II.C.6. of the policy. Utilities should plainly indicate information they determine to be proprietary which BPA should therefore not release to the public. BPA will protect such information to the full extent of the law.

XI. Other Issues

A. Intertie Expansion Plans

Issue #1: Effect on Intertie Expansion Proposals

Summary of Comments

The TANC members believe that expansion of transmission capacity will support BPA's goals and objectives as outlined in the Near Term IAP and that such transmission expansion will enhance economic and reliable electric service within both regions. PG&E echoed this by stating that failure to expand Intertie capacity would mean a long-term loss of PNW export sales and revenues as a result of pursuing short-term revenue increases. (Pugh, TANC, p. 2; Gardiner, PG&E, p. 7.)

The CEC and CPUC feel that a more equitable distribution of benefits between California and the NW must be achieved before any investments by California entities in expanded transmission capacity can be brought to fruition. They believe that under current circumstances, it is very difficult for California parties to think that they will acquire the necessary benefits to justify California investments in transmission capacity

additions. (Imbrecht, CEC, p. 3; Fairchild, CPUC, p. 2.)

Evaluation of Comments

The Near Term IAP will not directly affect the viability of planned Intertie expansions. None of the currently discussed proposals to expand Intertie capacity, including the DC Terminal Expansion and California-Oregon Transmission Project, will be completed during the effective period of the Near Term IAP (May 1985-September 1986). BPA plans to implement a Long Term IAP to replace the Near Term IAP after September 1986. The Long Term IAP and its Environmental Impact Statement (EIS) will consider the relationship among the IAP, surplus power sales, and Intertie capacity.

BPA agrees with TANC that "transmission expansion will enhance economic and reliable electric service within both our regions." BPA does not share the views of the CPUC, PG&E, and the CEC that the IAP diminishes the economic financial feasibility of planned Intertie expansions. Economic analysis submitted by BPA before Congressional committees shows substantial benefits to both the PNW and PSW from planned Intertie expansions. This analysis shows that the IAP will not diminish the feasibility of Intertie expansion proposals, and may actually enhance the benefits of Intertie expansion by facilitating firm power contracts (Interim IAP ROD, pp. 19-20).

Also, as discussed in section III.C. above, the increase in generation within the California utility systems must be seen as a potential factor in the cost-benefit analysis of increased import capability. For

instance, PG&E and SCE apparently experienced minimum generation conditions during 33 percent and 21 percent, respectively, of the hours of 1983. This is linked to the energization of additional large baseload units. Of course, BPA's 1984 Interim IAP played no part in the past decisions on nuclear plants in the SW, and therefore, cannot be blamed for the resulting decreased value of transmission expansion plans.

Issue #2: Ownership of Future Intertie Expansion Capacity

Summary of Comments

PGP and EWEB indicate that they support financing and ownership participation by PNW utilities in any future Intertie expansion. (Garman, PGP, p. 3; Kunkel, EWEB, p. 2.)

Evaluation of Comments

The decision to expand Intertie capacity and the financing and ownership of future Intertie capacity are outside the scope of the Near Term IAP. Any decisions about additional Intertie expansions and their ownership will involve separate environmental and public involvement processes. BPA notes the expressions of interest of EWEB and PGP and will keep them and other interested parties informed of transmission expansion proposals.

Decision

BPA believes that the Near Term IAP will not affect the viability of planned Intertie expansion proposals.

Decisions about Intertie expansion projects and their ownership are outside the scope of the Near Term IAP.

B. Long Term IAP

Summary of Comments

WAPA urges the timely development of the Long Term IAP. (Coleman, WAPA, p. 1.)

The PGP strongly urges BPA to include in the Long Term IAP provisions that secure a portion of the Intertie for movement of nonfirm energy because of the overriding impact that nonfirm sales had in justifying its construction. Additional firm access should only be provided when Intertie expansion takes place. (Garman, PGP, pp. 1-2.)

Evaluation of Comments

BPA recognizes that WAPA and other NW and California entities look forward to the assurance of a Long Term IAP. As discussed in section I.A. of the Interim IAP ROD, the Near Term IAP will help provide some assured access for firm Intertie transactions while providing access for nonfirm sales during the necessary development of the Long Term IAP.

Decision

The Near Term IAP does not contain provisions which result in commitment on the Intertie beyond its term.

C. Cogeneration

Summary of Comments

The AWPPW complains that through the Near Term IAP, BPA has not done enough to encourage development of the cogeneration potential. (Bryson, AWPPW, p. 2.)

Evaluation of Comments

This issue was raised in the Interim IAP ROD (pp. 29-30). Commenters at that time admitted that they knew of no cogeneration potential within the expected term of the Near Term IAP.

Decision

Intertie access is not provided for new cogeneration under the Near Term IAP, but will be addressed as an issue for the Long Term IAP.

D. PGE Status as an Owner

Summary of Comments

PGE states its understanding to be that the IAP was developed to provide control over use of the Federally owned portions of the Intertie. As such, the policies included in the Near Term IAP apply only to the Federally controlled capacity of the Intertie. To clarify their position, PGE asked that future descriptions of "Assured Delivery for firm contracts" contained in section II.D. of the Near Term IAP should recognize

PGE's ownership and contractual rights. (Dyer, PGE, p. 1.)

PGE feels that the IAP should be applied fairly and in a nondiscriminatory manner, and that even though they have the rights specified above, PGE expects access to Federally controlled capacity in the same manner as any other NW utility. (Dyer, PGE, p. 2.)

PGE feels that their Contract No. DE-MS79-84BP91883 should be reflected in the examples contained in Exhibit A. (Dyer, PGE, p. 1.)

Evaluation of Comments

BPA believes the Intertie Access Policy is sufficiently clear that only that Intertie capacity which BPA controls will be allocated under the policy. "Intertie Capacity," as it is used in the policy and its exhibits, is defined to include only BPA-controlled capacity. BPA has acknowledged PGE's Intertie ownership in the recent PGE/BPA settlement agreement, Contract No. DE-MS79-84BP91883. In section II.D.1.a, BPA also acknowledges PGE's and PP&L's Intertie priority rights under their respective Intertie Agreements with BPA. It is inappropriate to reflect PGE's ownership as an existing BPA contract in section II.D. of the Near Term IAP. That listing includes only transmission, power sales, and exchange commitments.

BPA believes it to be entirely appropriate to require PGE to fully utilize its own Intertie capacity before obtaining either Assured Delivery or a formula allocation on Federal capacity. Otherwise, other NW entities, including BPA, may be adversely affected through a decrease in Intertie capacity otherwise

available to meet their needs. PGE has not adopted an access policy which assures NW utilities that unused PGE Intertie capacity will be made available to meet their needs. In addition, BPA believes that it was the intent of the Intertie owners, as exhibited in the Intertie Agreements executed in 1965 and 1966, that each owner utilize its own capacity prior to having any rights on the other's capacity.

Decision

BPA has inserted into section II.C.1. the requirement that any entity which has non-BPA transmission access to California markets must fully use its own capacity prior to receiving any access on BPA Intertie capacity.

E. Regional Preference

Summary of Comments

The OPUC states that one of the important policy guidelines BPA proposes to adopt in the Near Term IAP is maintaining preference for PNW utilities. (Maudlin, OPUC, p. 2.)

Puget feels that BPA in selling power must comply with the statutory requirements of the Regional Preference Act. (Bailey, Puget, p. 1.)

Evaluation of Comments

BPA agrees with the commenters. These issues are fully discussed in Sections I.B. and II.A. of the ROD on the Interim IAP.

Decision

The Near Term IAP complies with the statutory requirements of the Regional Preference Act and BPA's implementation will be consistent with such requirements.

XII. Conclusion

BPA is implementing the IAP primarily to sell more of its available surplus energy at rates which recover the costs of production. In its ROD on the Interim IAP, BPA described the Administrator's Power Marketing Program and the need to assure the availability of sufficient Intertie capacity to successfully implement that program (ROD at pp. 45-59). In its brief in *LADWP v. BPA*, BPA included statements of Stephen A. Ailshie, BPA Assistant Administrator for Financial Management, John D. Carr, Assistant Director, BPA Division of Rates, and Shirley Melton, Director, BPA Division of Rates, declaring that the implementation of the IAP was necessary to support BPA's projected revenues and to recover costs. An effective IAP is a key factor in BPA's ability to repay the Federal Treasury on time while stabilizing rates for BPA power.

As discussed in the EA on the Near Term IAP, the need for an IAP continues and the success of its operation has been demonstrated (EA at pp. 6-8). BPA's 1985 rate case included surplus sales projections which assumed the existence of the IAP. BPA's ability to meet these projections and goals depends heavily upon the implementation of the Near Term IAP.

I have reviewed and hereby approve this Record of Decision as supporting my decision to adopt the Near Term Intertie Access Policy effective June 1, 1985.

Issued at Portland, Oregon, this 31st day of May, 1985.

/s/ PETER T. JOHNSON
Peter T. Johnson
Administrator

Table 1
Prices Paid to BPA
for Energy in 1983 & 1984¹

	Last 4 Months			
	1983		1984	
	Sales (GWh)	Avg. Price (mills/ kWh)	Sales (GWh)	Avg. Price (mills/ kWh)
PG&E	1046	17.1	2169	25.7
LADWP	483	11.3	469	27.0
Edison	991	13.9	1256	26.2
SDG&E	<u>100</u>	<u>12.8</u>	<u>134</u>	<u>25.9</u>
Total	2620	14.6 ²	4028	26.0 ²

Prices Paid for Energy from Non-Federal Sources
B.C.Hydro

	Sales from Last 4 Months			
	1983		1984	
	Sales (GWh)	Avg. Price (mills/ kWh)	Sales (GWh)	Avg. Price (mills/ kWh)
PG&E	588	23.7	162	23.6
LADWP	740	22.2	340	26.0
Edison	616	24.0	192	23.3
SDG&E	<u>53</u>	<u>24.7</u>	<u>7</u>	<u>29.4</u>
Total	1997	23.2 ²	701	24.7 ²

[Table 1 - Cont.]
Sales from other Principal Non-Federal

	1983		1984	
	Sales (GWh)	Avg. Price (mills/ kWh)	Sales (GWh)	Avg. Price (mills kWh)
PG&E	975	23.3	1560	27.6
LADWP	343	22.2	99	28.9
Edison	1194	24.1	1922	25.2
SDG&E	<u>412</u>	<u>21.8</u>	<u>445</u>	<u>25.4</u>
Total	2924	23.2 ²	4026	26.2 ²
Grand Total	4921	<u>23.3²</u>	<u>4727</u>	<u>26.0²</u>
Grand Total with BPA		<u>20.2²</u>		<u>26.0²</u>

¹ These tables were taken from a report by the California Public Utilities Commission entitled "The Marketing of Surplus Northwest Power to California," 1/30/85, pp. 19-20.

² These numbers were added by BPA to the CPUC tables.

Table 2

**INTERTIE SALES AND USE
SINCE SEPTEMBER 14, 1984
COMPARISON OF THIS YEAR TO LAST
YEAR**

	Sep 14-30 1984	Oct 1984	Nov 1984	Dec 1984	Jan 1985	Feb 1985	Mar 1985
(1) BPA Sales							
SP (MWh)	519,083	1,092,979	1,319,961	1,178,285	532,836	337,615	166,723
% Last Year	477.2	284.2	626.2	864.9	1,003.8	300.2	107.8
NF (MWh)	0	0	0	0	886,033	1,829,613	81,846
% Last Year	n/c ¹	-	-	-	48.1	75.4	3.1
Total BPA (MWh)	519,083	1,092,979	1,319,961	1,178,285	1,418,869	2,167,228	248,569
% Last Year	330.3	284.2	116.1	94.3	74.9	85.4	9.0
(2) Other PNW Sales							
Bilateral (MWh)	906,500 ¹	1,395,391	1,013,693	1,424,288	1,318,082	637,595	1,624,005
% Last Year	124.1	116.2	108.5	256.4	244.5	151.9	765.3
NF—Exportable (MWh)	0	0	0	0	153,764	224,580	0
% Last Year	-	-	n/c	n/c	124.8	392.8	n/c
Total (MWh)	906,500 ¹	1,395,391	1,013,693	1,424,288	1,471,846	862,175	1,624,005
% Last Year	124.1	116.2	91.2	238.3	222.3	180.7	691.6

[Table 2 - Cont.]

	Sep 14-30 1984	Oct 1984	Nov 1984	Dec 1984	Jan 1985	Feb 1985	Mar 1985
(3) Extraregional							
B.C. Hydro							
MWh This Year	170,000 ¹	44,514	5,519	3,613	575	28,283	1,312,672
% Last Year	34.2	6.9	1.6	1.1	0.3	60.3	2
W. Kootenay							
MWh This Year	3,950 ¹	85	91	0	0	0	0
% Last Year	14.0	0.1	0.0	-	-	-	-
Extrareg. Participation							
% Total Sales							
Last Year	37.1	31.0	13.1	14.6	6.6	1.5	7.8
% Total Sales							
This Year	10.9	1.8	0.2	0.1	0.0	0.9	41.2
(4) Capacity Available (Monthly Average)							
A.C.-Average MW	2,505	2,751	2,757	2,780	2,614	2,793	2,700
A.C.- % Last Year	96.9	98.3	98.5	99.4	94.4	102.8	111.9
D.C.-Average MW ³	1,388	881	675	1,277	1,595	1,819	1,915
D.C.- % Last Year	90.2	102.4	57.9	83.1	111.9	123.2	125.3

[Table 2 - Cont.]

	Sep 14-30 1984	Oct 1984	Nov 1984	Dec 1984	Jan 1985	Feb 1985	Mar 1985
(5) Net Schedule—Amount Utilized for Schedules (Monthly Average)							
A.C.-Average MW	2,347	2,658	2,720	2,627	2,498	2,768	2,555
A.C.-% Last Year	108.6	113.9	114.0	151.2	115.3	104.7	110.2
D.C.-Average MW	1,177	753	519	801	1,285	1,636	1,599
D.C.-% Last Year	100.6	121.3	50.4	78.1	111.4	113.0	105.6
(6) Load Factor (% of Available Capacity Used)							
A.C.-Last Year	83.6	83.3	85.3	62.1	78.2	97.3	96.1
A.C.-This Year	93.7	96.6	98.7	94.5	95.6	99.1	94.6
D.C.-Last Year	76.0	72.2	88.3	66.8	81.0	98.1	99.2
D.C.-This Year	84.8	85.5	76.9	62.7	80.6	89.9	83.5
Total-Last Year	79.8	77.8	86.8	64.5	79.6	97.7	97.7
Total-This Year	89.3	91.1	87.8	78.6	88.1	94.5	90.0

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[Table 2 - Cont.]

	Sep 14-30 1984	Oct 1984	Nov 1984	Dec 1984	Jan 1985	Feb 1985	Mar 1985
(7) Condition 1							
Hours	0	0	0	0	326	521	0 ⁴
%		0	0	0	0	43.8	77.5
0							
(8) Condition 2							
Hours	160	654	720	744	418	148	145 ⁴
%		39.2	87.8	100	100	56.2	22.0
19.5							
(9) Condition 3							
Hours	248	91	0	0	0	3	599 ⁴
%		60.8	12.2	0	0	0	0.5
80.5							

[Footnotes to Table 2]

¹ Estimated.

² There were no sales last year during the month of March.

³ Available DC capacity fluctuates among the months shown due to scheduled maintenance outages, construction outages, and a subsequent increase in rated capacity due to improvements.

⁴ The total hours of use for each condition from September 14 through March 31 with their corresponding percentage is as follows:

	Hours	Percentage
Condition 1	847	17.7%
Condition 2	2989	62.6%
Condition 3	441	19.7%

⁵ "n/c" indicates "no calculation" due to 0 in Last Year; "-" indicates 0 in both years.

Table 3
PG&E's 1983 Pacific Southwest Economy
Energy Purchases¹

Supplier²	Average Cost (Mills/kWh)	Purchase (GWh)
Inland SW	25.2	60
California	9.6	13,799
Canada	23.4	646
BPA	11.6	6,853
PNW ³	29.6	2,210

-
1. Source: PG&E 1983 FERC Form 1.
 2. Inland SW purchases include purchases from Nevada and Arizona. PNW includes purchases from Montana, Oregon, and Washington (excluding BPA and Canada).
 3. Includes 336 GWh of NW power purchased from SCE.

[Table 3 - Cont.]
SCE's 1983 Economy Energy Purchases¹

Supplier	Average Cost (Mills/kWh)	Purchase (GWh)
Inland SW	23.6	4,970
California	20.0	4,888
Canada	22.4	807
BPA	9.0	6,965
PNW	22.7	1,667

1. Source: SCE 1983 FERC Form 1.

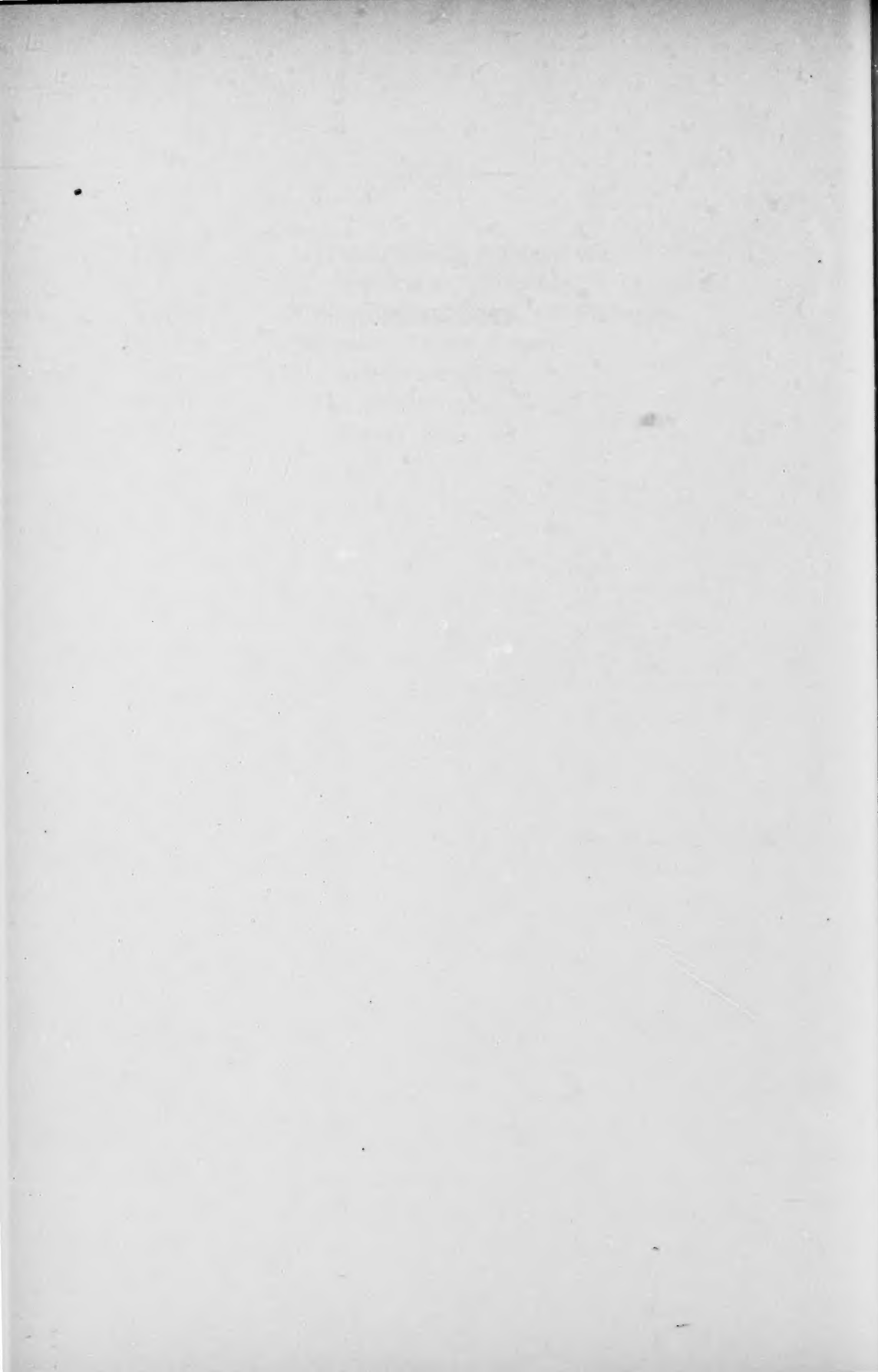
Appendix A
INDEX OF ABBREVIATIONS

AFS	Average Firm Surplus
aMW	Average Megawatt
AWPPW	Association of Western Pulp & Paper Workers
BPA	Bonneville Power Administration
CEC	California Energy Commission
CPUC	California Public Utilities Commission
CRITFC	Columbia River Inter-Tribal Fish Commission
Douglas	PUD #1 of Douglas County
DSIs	Direct Service Industries, Inc.
EA	Environmental Assessment
EIS	Environmental Impact Statement
EWEB	Eugene Water & Electric Board
FCRPS	Federal Columbia River Power System
Grant	PUD of Grant County
Grant PUD	PUD #2 of Grant County
GWh	Gigawatthour
IAP	Intertie Access Policy
ICA	Idaho Consumer Affairs
ICP	Intercompany Pool
IOU	Investor Owned Utility
IPC	Idaho Power Co.
Kootenay	West Kootenay Power & Light Co., Ltd.
kWh	Killowatthour
LADWP	Los Angeles Department of Water and Power

Mid-Columbia PUDs	Mid-Columbia PUDs of Chelan Co., Grant Co., & Douglas Co.
MPC	Montana Power Company
MW	Megawatt
NEPA	National Environmental Policy Act
NOAA	National Oceanic and Atmospheric Administration
NPPC	Northwest Power Planning Council
NW	Northwest
OPUC	Oregon Public Utility Commissioner
OY	Operating Year
PG&E	Pacific Gas & Electric Co.
PGE	Portland General Electric Co.
PGP	Public Generating Pool
PNGC	Pacific Northwest Generating Company
PNUCC	Pacific Northwest Utilities Conference Committee
PNW	Pacific Northwest
PP&L	Pacific Power & Light Co.
PSW	Pacific Southwest
Puget	Puget Sound Power & Light Co.
SCE	Southern California Edison
SCL	Seattle City Light
SMUD	Sacramento Municipal Utility District
SW	Southwest
Tacoma	Tacoma Department of Public Utilities

TANC	Transmission Agency of Northern California
WADOF	Washington Dept. of Fisheries
WAPA	Western Area Power Administration
WWP	The Washington Water Power Co.

APPENDIX I



APPENDIX I

[BONNEVILLE POWER ADMINISTRATION]

PROPOSED LONG TERM INTERTIE ACCESS POLICY [OCTOBER 1986]

A. Definitions

1. "Administrator" means the Administrator of Bonneville Power Administration (BPA) and is used interchangeable herein with BPA.

2. "Administrator's Power Marketing Program" or "BPA's Power Marketing Program" means the aggregate of BPA's power marketing actions taken and policies developed to fulfill BPA's statutory obligations and policy directives. These actions and policies are based on the exercise of broad authority to act, consistent with sound business principles, to recover adequate revenue to repay the Federal investment in the Federal system while, at the same time, encouraging the widest possible diversified use of electric power at the lowest possible rates for BPA customers. BPA's Power Marketing Program includes the Administrator's obligation to meet his power supply obligations in the Pacific Northwest and to market surplus power in the Pacific Northwest in a manner that assures an adequate, reliable, economical, efficient, and environmentally acceptable power supply, while preserving regional and public preference to Federal electric power and maintaining BPA's present and future rates to all customers at the lowest level possible consistent with sound business principles. BPA's Power Marketing Program also includes the

Administrator's objectives to market surplus Federal power to the Southwest utilities at equitable prices under rates adopted pursuant to section 7(i) of the Pacific Northwest Electric Power Planning and Conservation Act (Pacific Northwest Power Act) and to assist in the marketing of the Pacific Northwest's surplus firm power to the Southwest.

3. "Assured Delivery" means Intertie transmission service provided by BPA under this policy that, for the term agreed to by BPA in the transmission contract and regardless of changes to this policy, is interruptible only as a result of uncontrollable forces or by a determination of the Administrator pursuant to subsection I.3.

4. "BPA Resources" means Federal Columbia River Power System (FCRPS) hydroelectric projects; resources acquired by the Administrator under long-term contracts, including resources acquired pursuant to section 6 of the Pacific Northwest Power Act; Exchange Resources consisting of electric power purchased under section 5(c) of the Pacific Northwest Power Act; and resources acquired pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act (Transmission Act).

5. "Entity" means an owner of a resource other than a Scheduling Utility.

6. "Existing Extraregional Resources" are those resources located outside the Pacific Northwest that were operational on September 7, 1984, other than extraregional resources that qualify as Existing Pacific Northwest Resources.

7. "Existing Pacific Northwest Resources" are:

- a. the Pacific Northwest resources of Scheduling Utilities that were operational on September 7, 1984;
- b. the extraregional resources of Scheduling Utilities dedicated to Pacific Northwest load on September 7, 1984, which include pro rata portions of Montana Power Company's and Pacific Power and Light Company's shares of Colstrip 4 based on the ratio of their regional loads to their total loads and the Idaho Power Company's share of Valmy 2; and
- c. the Pacific Northwest resources of Pacific Northwest Entities that were operational on September 7, 1984, and for which a continuing relationship had been established by that date with a Scheduling Utility or BPA to serve Pacific Northwest load.

Existing Pacific Northwest Resources do not include BPA Resources.

8. "FD Supported Sales" means that portion of a firm sale by a Pacific Northwest utility to a Southwest party that is equal to the utility's purchase of BPA Firm Displacement Power.

9. "Intertie Capacity" means transmission capacity on the Pacific Intertie controlled by BPA through ownership or contract right, increased by electric power scheduled South to North and decreased by loop flow, outages, and other factors that reduce transmission capacity from North to South, and decreased by Pacific Power and Light's scheduling rights at Malin under Contracts Nos. DE-MS79-86BP92299 and DE-MS79-79BP90091.

10. "New Hydroelectric Plant" means any non-Federal hydroelectric power producing facility within

the Columbia River Basin that becomes operational on or after September 7, 1984.

11. "Pacific Intertie" means the Pacific Northwest-Pacific Southwest Intertie that consists of three high-voltage transmission lines (two 500-kilovolt (kV) alternating current (AC) lines and one 1,000-kV direct current (DC) line), which extend from Oregon into California or Nevada, and any additions thereto identified by BPA as Pacific Northwest-Pacific Southwest Intertie facilities.

12. "Pacific Northwest" means, as defined in the Pacific Northwest Power Act, 16 U.S.C. §839e, the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River Drainage Basin, and any contiguous areas, not in excess of 75 air miles from the area referred to above, which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of the Pacific Northwest Power Act which has a distribution system from which it serves both within and without such region.

13. "Qualified Extraregional Resources" means:

- a. Existing Extraregional Resources until such time that the Administrator determines that the capacity of the Pacific Intertie is rated at approximately 7900 MW; and
- b. after the Administrator has determined that the capacity of the Pacific Intertie is rated at approximately 7900 MW, all resources located outside of the Pacific North-

west, other than extraregional resources that are Qualified Pacific Northwest Resources.

14. "Qualified Pacific Northwest Resources" means:

- a. Existing Pacific Northwest Resources; and
- b. New regional resources of Scheduling Utilities:

- (1) if the Administrator determines that the new regional resource is necessary to fulfill a firm power sales contract that has been granted Assured Delivery based on Existing Pacific Northwest Resources, which resources have since been removed from operation or have become necessary to serve the Scheduling Utility's regional load; or

- (2) after the Administrator has determined that the capacity of the Pacific Intertie is rated at approximately 7900 MW.

15. "Resource" means an identified electric generating plant or stack of particular electric generating plants identified to supply power or capacity for sale over the Intertie.

16. "Section 9(i)(3) priority resource" means a resource that the Administrator has determined qualifies under section 9(i)(3) of the Pacific Northwest Power Act as interpreted by BPA's "Legal Interpretation of Section 9(i)(3)", issued March 3, 1986.

17. "Scheduling Utility" means a utility, not including BPA, that operates a generation control area within the Pacific Northwest, and any utility within BPA's generation control area that schedules with

BPA and is designated as a Computed Requirements customer.

18. "Substantial adverse impact," or "substantial increase" or "substantial decrease," or "substantially interfere," means a change that is or qualitative significance, of significant measurable effect, and of sufficient magnitude to require remedial action.

B. Term

This policy is effective on July 1, 1987, and will continue in effect until terminated or modified by the Administrator.

C. Conditions for Intertie Access

1. The Administrator will provide Assured Delivery or will allocate available Intertie Capacity to BPA and the Scheduling Utilities pursuant to the conditions and procedures set forth in this policy, unless otherwise provided by the terms of existing contracts listed in Exhibit C. An Entity that desires access to the Pacific Intertie for a resource may request access through the Scheduling Utility or BPA depending upon whose control area contains the Entity's resource.

2. The Administrator will provide Assured Delivery or allocate available Intertie Capacity only for power from BPA Resources and Qualified Pacific Northwest Resources, except to the extent that Qualified Extraregional Resources are permitted access under this policy. For purposes of determining access to BPA's Intertie Capacity, utility declarations of available surplus shall not include amounts of energy that have been purchased from an extraregional utility

if the Administrator determines such purchase would interfere with the marketing of BPA power and would decrease the Intertie access that BPA and Scheduling Utilities would otherwise have. If BPA determines that an extraregional purchase has been improperly included in the declaration, BPA shall adjust such utility's Intertie access accordingly.

3. Subject to reserving Intertie Capacity otherwise required by the Administrator to support the Administrator's Power Marketing Program, the Administrator will provide Assured Delivery or allocate Intertie Capacity for a Qualified Pacific Northwest Resource or a Qualified Extraregional Resource only when providing such Intertie access:

- a. will not substantially interfere with:
 - (1) the Administrator's Power Marketing Program; or
 - (2) the operating limitations of the Federal system; and
- b. will not conflict with:
 - (1) the Administrator's existing contractual obligations; or
 - (2) any other legal obligations of the Administrator; and
- c. will not enable:
 - (1) the construction or operation of a New Hydroelectric Plant that will have a substantial adverse impact on fish and wildlife resources within the Columbia River Basin; or
 - (2) the operation of Qualified Pacific Northwest Resources including New Hydroelectric Plants in a manner that is not in

compliance with applicable licenses, permits, or other provisions of state or Federal law; or

(3) the operation of Existing Pacific Northwest Resources whose use will adversely impact fish or wildlife in a manner that results in a substantial decrease in the effectiveness of, or a substantial increase in the need for, expenditures or other actions by the Administrator to protect, mitigate, or enhance fish and wildlife; or otherwise substantially interferes with the obligations of the Administrator under the Pacific Northwest Power Act to adequately protect, mitigate, or enhance fish and wildlife including taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable the Fish and Wildlife Program adopted by the Northwest Power Planning Council pursuant to the Pacific Northwest Power Act.

4. "Operating limitations of the Federal system," which includes the Federal power and transmission systems, result from the Administrator's obligation to operate the Federal system in an economical and reliable manner consistent with prudent utility practices. These operating limitations include, but are not limited to:

- a. The BPA Reliability Criteria and Standards;
- b. Western System's Coordinating Council (WSCC) Minimum Operating Reliability Criteria;

c. North American Electric Reliability Council-Operating Committee Minimum Criteria for Operating Reliability; and

d. the limitations that result from the Administrator's coordination with other utilities and Federal agencies regarding resource and river operations.

5. "The Administrator's existing contractual obligations" include, but are not limited to, those contracts listed in Exhibit C. Section D describes how BPA will implement the Assured Delivery and allocation procedures to avoid conflict with these contracts.

6. Any Scheduling Utility or Entity that has access to Southwest markets by contractual or ownership rights to non-BPA transmission facilities will be required to use the capacity of such facilities prior to receiving any access to BPA Intertie Capacity.

7. Access to Intertie Capacity is conditioned on compliance with the terms of this policy, including compliance with the Procedures for Review of Compliance and Remedies, section I below.

D. Intertie Capacity Reserved for BPA

1. BPA will reserve for BPA's use Intertie Capacity sufficient to transmit the full amount of BPA's surplus firm power.

2. BPA will reserve Intertie Capacity sufficient to perform its obligations under existing BPA contracts as listed in Exhibit C, Existing BPA Contracts.

3. In addition to the Intertie Capacity reserved by BPA pursuant to 1 and 2 above, BPA may utilize available Intertie Capacity as specified in a. and b.

below. BPA will give notice to Scheduling Utilities of such transactions.

- a. To perform BPA's obligations under new BPA transactions.
- b. To transmit a Scheduling Utility's energy and/or capacity under an FD Supported Sale in the proportion of the FD component to the total sale. The remaining portion of the sale must qualify for Assured Delivery as provided in section E.

E. Assured Delivery for Intertie Access

1. Exhibit B for Scheduling Utilities

a. For each Scheduling Utility, BPA will establish, and may from time to time revise, a maximum amount of Assured Delivery, based on the utility's average firm energy surplus, which will be shown in Exhibit B of this policy. A Scheduling Utility may retain all or part of its Exhibit B surplus to the extent the Scheduling Utility obtains Assured Delivery for a firm sale during the period of its surplus and later obtains new resources or power to serve such sale. Two transmission contracts of the Washington Water Power Company (WWPCo), listed in Exhibit C, that were executed prior to September 7, 1984, are an exception. These contracts have a combined firm transmission demand greater than WWPCo's average firm surplus shown in Exhibit B. WWPCo's rights to use these

transmission contracts above its Exhibit B amount are not altered by this policy.

b. A Scheduling Utility may increase its Exhibit B amount by purchasing surplus firm power from BPA or any Scheduling Utility. BPA will adjust Exhibit B for the buying and selling utilities accordingly.

2. Assured Delivery for Firm Power Contracts of Scheduling Utilities

a. Assured Delivery will be provided for Scheduling Utilities' contracts listed in Exhibit C.

b. For new firm power contracts of a Scheduling Utility or for existing firm power contracts of a Scheduling Utility not included in Exhibit C, Assured Delivery may be provided for a maximum of 20 years to the extent that such contract:

(1) meets the conditions of section C., above; and

(2) is determined by BPA to be a firm power sale on the basis of the following considerations:

(a) the extent to which the contract provides for the sale of firm power from specified resources by a Scheduling Utility in which the amount of power to be delivered, the price, and terms for delivery are specified in a manner that assures that the contract is not merely an advance arrangement to sell nonfirm power;

(b) the extent to which the contract provides for a firm sale resulting in a net decrease in the region's surplus;

(c) the extent to which the selling price is not subject to change based on day-to-day fluctuation in market price;

(d) the extent to which the sale does not increase the costs to the Administrator of Exchange Resources; and

(e) the extent to which the buyer does not have the right to displace purchases under the contract with nonfirm energy.

c. The total maximum peak delivery of the contract or contracts for which a Scheduling Utility may be granted Assured Delivery may not exceed the Scheduling Utility's average firm energy surplus determined pursuant to subsection E.1.a. and as shown in Exhibit B.

d. A Scheduling Utility may be granted Assured Delivery only to the extent that the total firm energy that the utility is contractually obliged to deliver for an operating year does not exceed that utility's total energy surplus for such operating year, as set forth in Exhibit B.

3. Assured Delivery for Capacity Contracts of Scheduling Utilities

a. Assured Delivery may be provided for contracts for sales of capacity only, to the extent that such contracts:

- (1) meet the conditions of section C., above; and
- (2) the total maximum peak delivery of the contract or contracts, including the capacity contract, for which a Scheduling Utility is granted Assured Delivery, may not exceed the Scheduling Utility's average firm surplus as shown in Exhibit B; and
- (3) when Condition 1 is in effect, pursuant to subsection F.1., the capacity contract will not be granted Assured Delivery, but rather may be served under the Scheduling Utility's Formula Allocation, or if that allocation is insufficient the contract may be served by purchasing power from BPA.

4. Assured Delivery for Capacity/Energy and Seasonal Exchange Contracts of Scheduling Utilities

- a. Until BPA is within a planning horizon of load/resource balance, as determined by the Administrator, Assured Delivery generally will not be granted for capacity/energy or seasonal exchange contracts of Scheduling Utilities.
- b. Once BPA is within a planning horizon of load/resource balance, as determined by the Administrator, Assured Delivery may be granted for capacity/energy and seasonal exchange contracts of Scheduling Utilities. The criteria BPA will use to determine whether to grant Assured Delivery for capacity/energy or seasonal exchange con-

tracts are that the contracts do not conflict with:

- (1) the provisions of section C;
- (2) BPA's ability to recover revenues; and
- (3) the efficient operation of the Federal Columbia River Power System.

5. Assured Delivery for FD Supported Sales

- a. As provided in subsection D.3., above, BPA will provide, from BPA's reserved Intertie Capacity, Assured Delivery necessary to transmit the power and/or capacity under an FD Supported Sale in the amount of the FD component to the total sale.
- b. For the remainder of the FD Supported Sale, the Scheduling Utility may be granted Assured Delivery consistent with the provisions of subsections E.2., E.3., and E.4., whichever is appropriate.
- c. The Assured Delivery granted a Scheduling Utility for the remainder of the FD Supported Sale plus the total of all Assured Delivery granted for other contracts of that Scheduling Utility may not exceed that Scheduling Utility's average from energy surplus as shown in Exhibit B.

6. Assured Delivery for Section 9(i)(3) Priority Resources

A Scheduling Utility will be granted Assured Delivery for the total regional share of a section 9(i)(3) Priority Resource even if the amount of Assured

Delivery exceeds the Exhibit B of the Scheduling Utility, if the contract under which the section 9(i)(3) priority resource is sold is otherwise in compliance with the terms of this policy.

7. Implication on BPA's Obligation to Serve Pacific Northwest Load

a. It is BPA's intent that the granting of Assured Delivery under subsections E.2., E.3., and E.4. not decrease BPA's ability to serve Pacific Northwest load. To ensure this result, the granting of Assured Delivery will be conditioned on a satisfactory contractual commitment by the Scheduling Utility at the time Assured Delivery is granted that either:

(1) the Scheduling Utility will purchase from BPA requirements to meet the Scheduling Utility's deficit up to the cumulative amount of Assured Delivery that is granted; or

(2) the Scheduling Utility's increased requirements on BPA, when the Scheduling Utility notifies BPA of increased load requirements under the provisions of the Scheduling Utility's Power Sales Contract with BPA, will be reduced by the cumulative amount of Assured Delivery that BPA has granted the Scheduling Utility.

Sales by Scheduling Utilities of the Pacific Northwest hydroelectric resources will be subject to section 3(d) of Pub. L. 88-552.

8. Requests for Assured Delivery and Scheduling Requirements

a. Scheduling Utilities requesting Assured Delivery for a contract must submit a conformed copy of the executed contract to the Administrator. The Administrator shall review the contract and make a determination of whether a grant Assured Delivery consistent with the following procedure:

(1) If the Qualified Pacific Northwest Resource for which the Scheduling Utility seeks Assured Delivery is not a New Hydroelectric Plant or, if Assured Delivery is sought for a system sale and the Scheduling Utility's resource stack does not include such New Hydroelectric Plant, the Administrator shall determine whether the submitted contract meets the eligibility criteria set forth above, and will provide within 60 days written notification of this determination, specifying the amount and term of Assured Delivery to be provided for the contract.

(2) If the Qualified Pacific Northwest Resource for which the Scheduling Utility seeks Assured Delivery is a New Hydroelectric Plant, or if Assured Delivery is sought for a system sale and the Scheduling Utility's resource stack includes such New Hydroelectric Plant, within 30 days of receipt of the request the Administrator will give notice of the request for Assured Delivery and request comment from the

applicable State and Federal fish and wildlife agencies, the Northwest Power Planning Council, the Indian Tribes, and other interested persons. Those comments received within 90 days of the notice of the request for Assured Delivery will be considered by the Administrator in determining whether to grant Assured Delivery. Based on the comments received and the analysis of BPA staff, the Administrator shall determine whether the New Hydroelectric Plant will have a substantial adverse impact on fish and wildlife resources within the Columbia River Basin. If the Administrator:

- (a) fails to find that the New Hydroelectric Plant will have a substantial adverse impact on resources within the Columbia River Basin, and
 - (b) determines that the submitted contract meets the eligibility criteria set forth above, the Administrator shall endeavor to provide written notification within 180 days from the date of submission of the request for Assured Delivery of the determination specifying the amount and term of Assured Delivery to be provided for the contract.
- b. In the event that available Intertie Capacity is reduced such that it is, in BPA's determination, insufficient for BPA firm deliveries and Assured Deliveries of other Scheduling Utilities, the Pacific Northwest and Southwest parties will establish schedules for delivery.

c. Once a Scheduling Utility has been granted Assured Delivery for a firm contract, in order for the Scheduling Utility to receive Assured Delivery, the parties to the contract must establish firm hourly schedules and must inform BPA of those firm hourly schedules prior to BPA's allocating Intertie Capacity as provided in section F below.

F. Formula Allocation Methods

1. BPA will determine the Intertie Capacity available for formula allocations described in subsection F.2., below, after first taking into account the conditions for Intertie access specified in section C, above; the Intertie Capacity necessary to serve existing contractual obligations as described in Exhibit C; the Intertie Capacity necessary to fulfill new BPA contractual obligations; the Intertie Capacity reserved for BPA's Firm Surplus Power; and the Intertie Capacity necessary to provide Assured Delivery for qualifying firm contracts as described in subsections E.2, E.3, and E.4, above. Access to the remaining available Intertie Capacity will be allocated according to the formulae described below. BPA reserves the right to preempt this allocation, in part or in whole, should BPA require additional Intertie Capacity in order to take actions to protect fish and wildlife resources within the Columbia River Basin.

2. One of three formulae will be used to allocate the available Intertie Capacity depending on which of these following three conditions exists:

a. Condition 1: When Exportable Energy is being scheduled pursuant to the terms of the

Exportable Agreement (BPA Contract No. 14-03-73155), Intertie Capacity will be allocated pursuant to the Exportable Agreement. An example of an allocation under Condition 1 is shown in Exhibit A. The allocation procedure of the Exportable Agreement is an existing contractual obligation and has not been changed as a result of this policy. Upon expiration of the Exportable Agreement on December 31, 1988, Condition 1 will be in effect when the Federal system is in spill or in likelihood of spill, as determined by BPA. Access to the Intertie Capacity will be allocated to BPA, for the purposes of transmitting Federal energy available for sale outside the region, and to Scheduling Utilities declaring surplus hydro energy. After expiration of the Exportable Agreement, at those times when Condition 1 is in effect the capacity will be allocated pursuant to the following procedure:

- (1) On any day the Scheduling Utilities observe as a normal workday, each Scheduling Utility shall submit to BPA declarations of daily quantities of surplus hydro energy and hourly capacity it has available for export sale for the period normally beginning at midnight of the day of declaration and continuing through midnight of the next normal workday.
- (2) BPA's and the Scheduling Utilities' allocations for each hour will approximate the ratio of each declaration to the sum of all declarations for each hour multiplied by

the available Intertie Capacity, except that each Scheduling Utility's allocation will be limited by the ratio of the Scheduling Utility's hydroelectric capacity to the total regional hydroelectric capacity multiplied by the total of all allocations.

b. Condition 2: When Condition 1 is not in effect, but BPA and Scheduling Utilities declare amounts of power available for access to the Intertie that exceed the available Intertie Capacity, as determined as described in subsection F.1., above, the capacity will be allocated pursuant to the following procedure:

(1) On any day the Scheduling Utilities observe as a normal workday, each Scheduling Utility shall submit to BPA declarations of daily quantities of energy and hourly capacity it has available for export sale for the period beginning at midnight of the day of declaration and normally continuing through midnight of the next normal workday.

(2) BPA's and the Scheduling Utilities' allocation for each hour will be determined and will approximate the ratio of each declaration to the sum of all declarations for each hour multiplied by the available Intertie Capacity. An example of an allocation under Condition 2 is shown in Exhibit A.

c. Condition 3: When Condition 1 is not in effect, and when BPA and Scheduling Utilities declare power available for access to

the Intertie in an amount that does not exceed the available Intertie Capacity, BPA's and each Scheduling Utility's allocation will be equal to their declarations. An example of an allocation under Condition 3 is shown in Exhibit A.

d. The allocation accorded each Scheduling Utility under subsections a., b., and c., above, will be decremented by the capacity associated with any New Hydroelectric Plant that the Administrator has determined pursuant to subsection I.3., below, has a substantial adverse impact on fish and wildlife resources within the Columbia River Basin.

G. Access for Qualified Extraregional Resources

1. Qualified Extraregional Resources will be granted access as follows:

a. Assured Delivery. Qualified Extraregional Resources will not be granted Assured Delivery, except as provided in the contracts shown in Exhibit C or as provided in section H, below.

b. Formula Allocation. Prior to the expiration of the Exportable Agreement, access during Condition 1 is governed by that agreement which provides that access to Intertie Capacity is limited to signatories to that agreement. After expiration of the Exportable Agreement, under Condition 1 and, except as provided in Section H, below, under Condition 2, Extraregional Utilities

will not receive an allocation of Intertie Capacity.

c. Under Condition 3, Extraregional Utilities will have access to the Intertie to the extent that Intertie Capacity is available in excess of the capacity used by BPA and Scheduling Utilities, except as provided in section H, below. Utilities outside the Pacific Northwest must fully use other available transmission before receiving access to Intertie Capacity.

H. Special Provisions for Canadian Resources

1. Canadian resources will be granted Assured Delivery only by contract with BPA. Such proposed contract would be evaluated by BPA and reviewed publicly to determine that there is no substantial interference with BPA's Power Marketing Program. Such contract must include benefits to BPA such as increased storage, improved system coordination or operations, or disposition of downstream benefits under the Canadian Treaty beginning in 1998. All transactions would contain as a condition precedent an increase in Intertie capacity to approximately 7900 MW. BPA would expect to conduct a National Environmental Policy Act review of such contracts when the contractual terms and conditions are proposed.

2. BPA may, by contract, provide Canadian utilities limited access to Intertie Capacity under Condition 2. Such access, however, would be conditioned on such utilities' participation in the Pacific Northwest's coordinated planning and operation to a greater extent than in the past or agreement to provide other

appropriate consideration of value to the Pacific Northwest.

3. Under Condition 3, Canadian utilities will have access to the Intertie to the extent that Intertie Capacity is available in excess of the capacity used by BPA, Scheduling Utilities and other U.S. Extraregional Utilities.

I. Procedures for Review of Compliance and Remedies

1. Access to Intertie Capacity is conditioned upon compliance with the terms of this policy. To verify consistency with this policy, upon BPA's request, Scheduling Utilities and extraregional utilities that are requesting or have received Assured Delivery or an allocation of Intertie Capacity, shall provide BPA with a list of resources that are to be operated or that were operated at such hours as access to the Intertie will be or was provided, and such other information as BPA may reasonably need to implement the policy. The utility shall clearly indicate whether it considers any such information proprietary. BPA will make such information available to the public to the extent it is not protected from disclosure by law.

2. Upon a determination by the Administrator that for reasons other than fish and wildlife considerations the terms of this policy are not being met, BPA will so notify the appropriate person(s) setting forth the nature of the noncompliance and the action(s) that may be taken to achieve compliance.

a. BPA will provide a reasonable opportunity to correct such noncompliance before imposing a sanction, other than decrementing an

allocation as provided in subsection F.2.d., above. BPA may impose a prospective sanction to account for actions already taken that were not in compliance with this policy.

b. BPA may fashion and impose an appropriate sanction for noncompliance. Sanctions that BPA may impose include, but are not limited to:

- (1) denial of access for a resource; or
- (2) refusal to accept schedules.

3. Procedures for review of compliance and remedies relating to Fish and Wildlife Resources:

a. This policy presumes that Qualified Pacific Northwest Resources, other than New Hydroelectric Plants and Qualified Extraregional Resources are being operated consistent with applicable licenses, permits, or other provisions of State and Federal law, and that the operation of these resources or providing access for these resources will not adversely impact fish and wildlife resources in a manner described in subsection C.3.c., above, unless the Administrator determines otherwise.

b. Any interested person who wishes to challenge the presumption that a Qualified Pacific Northwest Resource or Qualified Extraregional Resource is being operated consistent with applicable licenses, permits, or other applicable provisions of State and Federal law must make that challenge with the State or Federal agency responsible for regulation of the resource or administration of that law.

c. Any interested person who wishes to challenge the presumption that the operation of a Qualified Pacific Northwest Resource or Qualified Extraregional Resource will not adversely impact fish and wildlife in the manner described in subsection C.3.c., above, shall notify the Administrator in writing. The notification shall state in detail the manner in which and the extent to which fish or wildlife resources are being adversely impacted. The Administrator will provide a copy of that notification to the Scheduling Utility and to any other owner or operator of the resource, and accept public comment before making a determination whether fish and wildlife are being adversely impacted by the operation of the challenged resource.

d. Upon receipt of a determination by the relevant agency, under subsection I.3.b., above, that a hydroelectric resource is not in compliance with applicable licenses or permits or other applicable State or Federal law, the Administrator will not provide access to the Intertie for that resource.

e. For a resource that is being operated in compliance with applicable licenses or permits and other applicable State or Federal law, but that the Administrator determines will adversely impact fish or wildlife resources in the manner described in subsection C.3.c., above, the Administrator will not provide access unless:

- (1) the owner or operator of the resource agrees to modify the operation of the

resource in a manner to assure that the operation of the resource will not have the adverse impact determined by BPA; or

(2) the owner or operator of the resource agrees to make expenditures or take other actions not inconsistent with the program adopted by the Northwest Power Planning Council to protect, mitigate, or enhance fish and wildlife to offset the adverse impact to fish and wildlife described in subsection C.3.c., above.

f. At any time after the effective date of this policy, upon the petition of any interested person alleging that a New Hydroelectric Plant has a substantial adverse impact on fish or wildlife resources in the Columbia River Basin, the Administrator will determine whether such New Hydroelectric Plant has a substantial adverse impact on fish or wildlife resources within the Columbia River Basin. Before making such a determination, the Administrator will provide notice of such petition to the Scheduling Utility and the owner and/or operator of such New Hydroelectric Plant and to other interested persons including the state and Federal fish and wildlife agencies and Indian Tribes of the Pacific Northwest.

(1) Notice will establish a date by which comment must be received on the petition for such a determination and a process whereby the Administrator will make the determination, which will ordinarily be

made within 180 days of receipt of a petition.

(2) Upon a determination that such New Hydroelectric Plant will have a substantial adverse impact on fish or wildlife resources in the Columbia River Basin, each allocation to a Scheduling Utility pursuant to section F., above, will be decremented as provided in that section.

g. After a determination by the Administrator that a New Hydroelectric Plant will have a substantial adverse impact of fish or wildlife resources within the Columbia River Basin, the owner or operator of such New Hydroelectric Plant may petition for rescission of the determination upon a showing that the New Hydroelectric Plant no longer has a significant adverse impact on fish and wildlife resources within the Columbia River Basin. The Administrator will provide notice of such petition to interested persons including the state and Federal fish and wildlife agencies, the Northwest Power Planning Council, and Indian Tribes of the Pacific Northwest.

(1) Notice will establish a date by which comment must be received on the petition for rescission, and a process whereby the Administrator will determine whether to rescind the determination that a New Hydroelectric Plant has a significant adverse impact on fish and wildlife resources within the Columbia River Basin.

(2) After rescission of a determination that a New Hydroelectric Plant has a significant

adverse impact on fish or wildlife of the Columbia River Basin, the Administrator will not decrement any allocation of the Scheduling Utility pursuant to subsection F.2.d., above, by the amount of capacity associated with such Plant.

J. Exhibits

Exhibits A, B, and C are a part of this policy.

EXHIBITS

Exhibit A

Examples of formula allocations under each condition will be appended to the final policy when published.

Exhibit B

Exhibit B is proposed to be developed as it was for the Near Term Intertie Access Policy, based on regional planning documents.

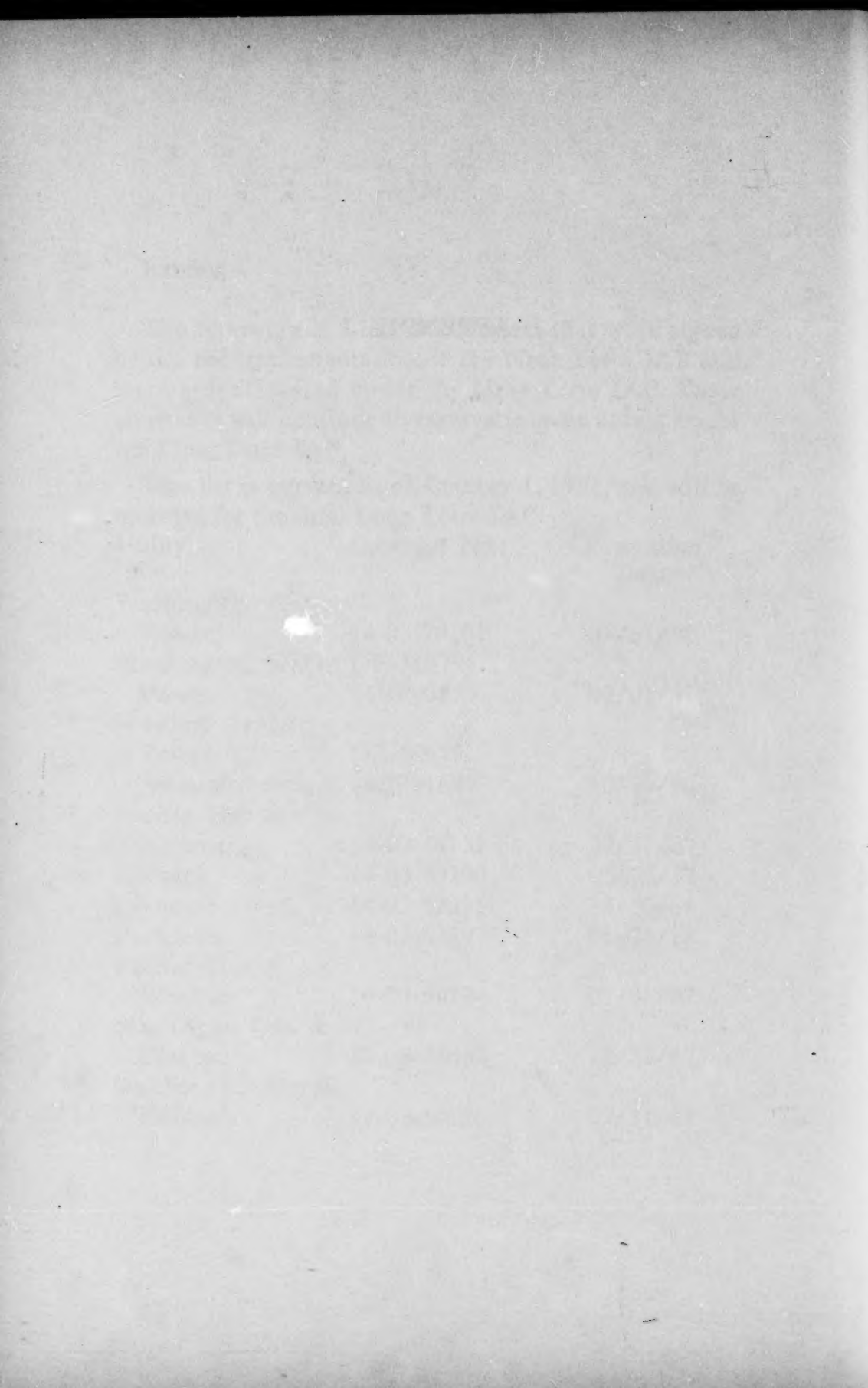
Exhibit C

The following is a list of contracts that were signed before the implementation of the Near Term IAP and were grandfathered under the Near Term IAP. These contracts will continue to receive Intertie access under the Long Term IAP.

This list is current as of October 1, 1986, and will be updated for the final Long Term IAP.

Utility	Contract No.	Expiration Date
Washington Water		
Power	14-03-79101	04/01/88
Washington Water	DE-MS79-	
Power	81BP90185	07/01/91
Western Area		
Power	DE-MS79-	
Administration	84BP91627	10/31/90
Pacific Gas &		
Electric	14-03-54132	07/31/87
Burbank	14-03-53290	05/05/87
Glendale	14-03-53295	12/30/86
Pasadena	14-03-53297	01/24/88
Pacific Gas &		
Electric	14-03-54134	07/31/87
San Diego Gas &		
Electric	14-03-58638	12/29/87
Southern California		
Edison	14-03-54126	07/31/87

· APPENDIX J



APPENDIX J

BONNEVILLE POWER ADMINISTRATION

REVISED DRAFT LONG-TERM INTERTIE ACCESS POLICY

DECEMBER 15, 1987

Section 1. Definitions

1. "Administrator" means the Administrator of Bonneville Power Administration (BPA) and is used interchangeably with BPA.

2. "Administrator's Power Marketing Program" refers to all marketing actions taken and policies developed to fulfill BPA's statutory obligations. These actions and policies are based on exercises of broad authority to act, consistent with sound business principles, to recover revenue adequate to amortize Federal investments in the Federal Columbia River power and transmission systems, while encouraging diversified use of electric power at the lowest practical rates. In the Northwest, the Administrator's Power Marketing Program includes BPA's power supply obligations and programs to market surplus power in a manner that assures an adequate reliable, economical, efficient, and environmentally acceptable power supply, while preserving regional and public preference to Federal electric power. In the Southwest, the Administrator's Power Marketing Program includes the Administrator's programs to market surplus Federal power at equitable prices and to assist in marketing the Northwest's non-Federal power surplus.

3. "Assured Delivery" means firm Intertie transmission service provided by BPA under a transmission contract to wheel power covered by a contract between a Scheduling utility and a Southwest utility. Assured Delivery contracts may not exceed 20 years' duration. The service is interruptible only in the event of an uncontrollable force or a determination made pursuant to sections 7 or 8 of this policy. Assured Delivery service will be reduced only by the amount of transmission capacity to the Southwest later acquired by a Scheduling Utility through ownership or contract.

4. "BPA Resources" means Federal Columbia River Power System hydroelectric projects; resources acquired by BPA under long-term contracts, including resources acquired pursuant to sections 5(c) and 6 of the Northwest Power Act; and resources acquired pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act.

5. "Extraregional Utilities" are generating utilities, or divisions thereof, that do not provide retail electric service and own or operate significant amounts of generating capacity in the Northwest.

6. "FD Supported Sale" means that portion of a Scheduling Utility's firm sale equal, in amount and shape, to the utility's purchase of BPA Firm Displacement power.

7. "Formula Allocation" means the shares of Intertie Capacity made available to Scheduling Utilities and, under certain conditions, Extraregional Utilities for short-term sales of energy.

8. "Intertie" means the two 500-kilovolt (kV) alternating current (AC) transmission lines and one 1,000-kV direct current (DC) line, which extend from Oregon into California or Nevada, and any additions

thereto identified by BPA as Pacific Northwest-Pacific Southwest Intertie facilities.

9. "Intertie Capacity" means the North to South transmission capacity of the Intertie controlled by BPA through ownership or contract; increased by power scheduled South to North, decreased by loop flow, outages, and other factors that reduce transmission capacity; and further decreased by Pacific Power & Light Company's schedules, under its scheduling rights at the Malin substation (BPA Contract Nos. DE-MS79-86BP92299 and DE-MS79-79BP90091).

10. "Mitigation" refers to the conditions, other than rate schedule provisions, imposed by BPA on a Scheduling Utility in return for an Assured Delivery contract. Mitigation helps offset operational and economic problems, attributable to a Scheduling Utility's power transaction, that inhibit BPA's ability to meet its existing firm load obligations or to generate revenues. The Mitigation measures specified in this policy must be included in all Assured Delivery contracts, unless substitute measures are negotiated with BPA on a case-by-case basis.

11. "Nonscheduling Utility" means a non-Federal Northwest utility that owns a generating resource, but does not operate a generation control area within the Pacific Northwest. A Nonscheduling utility requesting Intertie access for its resource must do so through the Scheduling Utility (or BPA) in whose control area the resource is located.

12. "Pacific Northwest" (or "Northwest") is defined in the Northwest Power Act, 16 U.S.C §839e, as the states of Oregon, Washington, and Idaho; the portion of Montana west of the Continental Divide; portions of Nevada, Utah, and Wyoming within the

Columbia River drainage basin; and any contiguous service territories of rural electric cooperatives serving inside and outside the Pacific Northwest, not more than 75 air miles from the areas referred to above, that were served by BPA as of December 1, 1980.

13. "Protected Area" means a stream reach within the Columbia River drainage basin specially protected from hydroelectric development because of the presence of anadromous or high value resident fish, or wildlife. Protected areas may also include stream reaches which could support anadromous fish if investments were made in habitat, hatcheries, passage, or other projects. This policy contemplates that BPA will implement, after review and possible modification, a comprehensive protected area program adopted by the Pacific Northwest Electric Power and Conservation Planning Council.

14. "Qualified Extraregional Resources" means:

(a) a generating unit located outside the Northwest that was in commercial operation on the effective date of this policy. However, the term excludes the portions of units covered as Qualified Northwest Resources.

(b) after the Administrator has determined that the capacity of the Intertie is rated at approximately 7,900 MW, all resources located outside of the Northwest, other than the portions of extraregional resources covered as Qualified Northwest Resources.

15. "Qualified Northwest Resources" exclude BPA Resources, but include:

(a) Generating resources located inside the Northwest that were in commercial operation

on the effective date of this policy. Regarding generating resources owned or controlled by Nonscheduling Utilities, it must be demonstrated that a relationship had been established by that date with a Scheduling Utility or BPA to serve Northwest loads.

(b) Scheduling Utility extraregional generating resources dedicated to Northwest loads on the effective date of this policy. This term includes pro rata portions of Montana Power Company's and Pacific Power and Light Company's shares of the Colstrip No. 4 generating station, based on the ratio of their respective regional loads to their respective total loads; and Idaho Power Company's share of Valmy No. 2.

(c) New regional resources of Scheduling Utilities, except for hydroelectric resources located in Protected Areas, needed to support power contracts receiving Assured Delivery service under this policy.

16. "Resource" means an identified electric generating unit or stack of particular electric generating units identified to supply power or capacity for sale over the Intertie.

17. "Scheduling Utility" means the Northwest portion of a non-Federal utility that operates a generation control area within the Northwest.

18. "Seasonal Exchange" means a transaction that takes advantage of seasonal diversity between Northwest and Southwest loads through transfers of firm power, at a prespecified delivery rate, from North to South during the Southwest's summer load season and from South to North during the Northwest's winter

load season. Seasonal Exchanges may involve payments of additional consideration to reflect the relative seasonal values of power throughout the western United States. Seasonal Exchange schedules of Northwest utilities will be referred to as "deliveries," and schedules of Southwest utilities will be referenced as "returns." A Scheduling Utility must be able to support its summertime firm power deliveries with generating resources that are surplus to its Northwest requirements. The sum of a Scheduling Utility's energy resources for each month in which deliveries are made (with special concern for August) must exceed its corresponding Northwest loads by an amount sufficient to support the Seasonal Exchange.

19. "Section 9(i)(3) resource" means a Scheduling Utility resource that BPA has granted priority in receiving BPA transmission, storage and load factoring services.

Section 2. Intertie Capacity Reserved for BPA

The Administrator reserves for BPA's use Intertie Capacity sufficient to:

- (a) deliver the full amount of BPA's surplus firm power,
- (b) perform obligations under existing BPA transmission contracts listed in Exhibit C, to the extent such obligations differ from the conditions specified in this policy, and
- (c) provide Assured Delivery service for transactions not subject to limits under Exhibit B to this policy.

Section 3. Conditions For Intertie Access

(a) All Intertie access will be granted pursuant to the conditions and procedures of this policy, unless otherwise specified in the three existing BPA transmission contracts listed in Exhibit C.

(b) BPA will provide Intertie access only for BPA Resources and the Qualified Northwest Resources of Scheduling Utilities, except to the extent that Qualified Extraregional Resources are permitted access under this policy.

(c) BPA will provide Assured Delivery and allocate remaining Intertie Capacity when providing such access will not substantially interfere with operating limitations of the Federal system. Examples of these limitations, which reflect BPA's obligation to operate in an economical and reliable manner consistent with prudent utility practices, include:

- (1) The BPA reliability criteria and standards,
- (2) Western Systems Coordinating Council minimum operating reliability criteria,
- (3) North American Electric Reliability Council Operating Committee minimum criteria for operating reliability, and
- (4) coordination agreements among BPA, scheduling utilities and other Federal agencies regarding resource and river operations.

(d) Any utility that has contractual or ownership rights to transmission capacity to Southwest utilities must be fully utilizing such capacity prior to receiving any access to BPA Intertie Capacity.

Section 4. Assured Delivery for Intertie Access

Subject to the limitations and other conditions in this section and in other sections of this policy, BPA has determined that it can provide Assured Delivery to Scheduling Utilities without causing substantial interference with the Administrator's Power Marketing Program.

(a) **Access For Utilities Owning Or Controlling Southwest Interconnections** Assured Delivery is intended primarily for Scheduling Utilities which lack interconnections with the Southwest. A utility with transmission access to Southwest utilities, through contract or ownership, must utilize all such capacity on a firm basis before receiving any Assured delivery. A utility is eligible for Assured Delivery only to the extent that the sum of its Exhibit B amounts exceeds its own transmission capacity to the Southwest.

(b) **Waiver of BPA Service Obligation.** Assured Delivery contracts must contain a waiver of BPA's obligation under the Scheduling Utility's power sales contract, up to the amount of power for which firm Intertie access is provided.

(c) **Transactions Not Subject to Exhibit B Limits Under This Policy**

(1) **Joint Ventures.** Joint ventures between BPA and utilities, such as firm displacement contracts, which allow BPA to increase its sales of surplus power qualify for Assured Delivery.

(2) **Sales In Lieu Of Exchanges.** BPA may offer to satisfy Scheduling Utility demands for Seasonal Exchanges by selling them incremental amounts of surplus firm power during winter months. Upon committing to purchase such incremental firm power at negotiated prices that reflect BPA's lost opportunities for summer sales, a Scheduling Utility will qualify for Assured Delivery (with mitigation) to wheel an equal amount of firm capacity and energy over the Intertie during summer months.

(3) **Conditions.** A Scheduling Utility may request at any time the Assured Delivery of transactions identified in sections 4(c)(1) and 4(c)(2). Relevant contracts must be presented for review when Assured Delivery is requested. BPA will satisfy a request within 60 days after a Scheduling Utility has demonstrated satisfaction of the requirements of this policy.

(d) Transactions Subject To Exhibit B Limits Under This Policy

(1) **Maximum Amounts Of Assured Delivery.** BPA will provide 800 MW of Assured Delivery for transactions, limited by Exhibit B amounts, that are identified in this policy. BPA will determine the amount of any additional Assured Delivery increment

after conclusion of the Third AC participation process. Moreover, the 800 MW amount may be subject to some reduction if the DC terminal expansion project is not completed on schedule.

(2) Firm Power Sales

(A) Existing Transmission Contracts. BPA will provide Assured Delivery for the remaining term of the firm power sale contract identified in Exhibit C to this policy.

(B) Exhibit B amounts.

(i) Current maximum. Each Scheduling Utility's maximum Assured Delivery amount for firm sales equals its average firm energy surplus, shown in Exhibit B to this policy. Except for Montana Power Company (MPC), Exhibit B represents projected Scheduling Utility surpluses for the 1988-89 operating year. In satisfaction of all obligations to MPC under Northwest Power Act section 9(i)(3), MPC's Exhibit B amount is set at 105 MW to facilitate long-term sales of firm power from its share of the Colstrip No. 4 coal-fired generating station.

(ii) Future changes. BPA may, at its discretion, revise Exhibit B to reflect changes in the firm power surpluses of individual utilities; however, the 361 MW Exhibit B average firm surplus total is not subject to increase. Any unutilized Assured Delivery amount is

revoked if, upon revision, a utility's individual Exhibit B amount has declined or if a utility has sold firm power to another utility seeking to increase its Exhibit B average firm surplus amount. A Scheduling Utility may increase its individual Exhibit B amount by purchasing surplus firm power from BPA or any Scheduling Utility with an Exhibit B amount.

(iii) **Nature Of Transactions.** BPA will not provide Assured Delivery for transactions which a Scheduling Utility cannot demonstrate to be other than an advance arrangement to sell nonfirm energy. Nonfirm energy transactions may receive Intertie access only under section 5 of this policy.

(C) **Shaping.** Firm power sales eligible for Assured Delivery may be shaped within the following ranges. During the months of September through December, a Scheduling Utility may deliver firm energy at a rate up to 1.8 times its Exhibit B average firm surplus amount. During the months of January through August, a Scheduling Utility may deliver firm energy at a rate no greater than 1.0 times its Exhibit B amount. However, total delivered energy may not exceed the Exhibit B annual firm energy maximum.

(3) **Seasonal Exchanges**

(A) **Existing Contracts.** BPA will provide Assured Delivery for the remaining

term of the Seasonal Exchange contracts identified in Exhibit C to this policy.

(B) Exhibit B Amounts. Subject to the individual utility Seasonal Exchange maximums in Exhibit B, BPA will provide Assured Delivery to facilitate Seasonal Exchanges of Qualified Northwest Resources. The current Exhibit B (representing Intertie Capacity Available for Assured Delivery) is subject to revision at the discretion of BPA.

(4) Mitigation

(A) Firm Sales And Seasonal Exchange Deliveries. During any hour in which BPA has invoked Condition 1 allocation procedures to preschedule energy deliveries, each utility's Assured Delivery amount shall be deducted from its formula allocation to determine its share of energy scheduled on the Intertie. If the remainder is negative for a given utility, then that utility must purchase sufficient energy from BPA at BPA's then-applicable rate, to make up the difference.

(B) Seasonal Exchange Returns

(i) Returns. Exchange contracts must specify that all return energy be scheduled to either the AC Intertie point of interconnection at the California-Oregon border ("COB") or the DC Intertie point of interconnection at the Nevada-Oregon border ("NOB"). Exchange contracts must

also specify prescheduled determinations of hourly energy returns.

(ii) **Cash out.** During any hour in which BPA has invoked Condition 1 or Condition 2 allocation procedures to preschedule energy deliveries, a utility may not utilize the cash-out provisions of a Seasonal Exchange contract. The rate of a cash out during Condition 3 shall not exceed than [sic] the rate at which the exchange return could have been scheduled.

(5) **Satisfying Requests For Assured Delivery.** To allow sufficient time for contract negotiation, initial requests under this policy will be accepted until February 1, 1989. Thereafter, BPA will negotiate and execute Assured Delivery contracts. If Intertie Capacity remains available for Assured Delivery of transactions limited by Exhibit B amounts, subsequent requests must be received no later than 120 days before commencement of the next BPA operating year. All relevant power contracts must be presented for review no later than the date on which a request for Assured Delivery is made. BPA will not entertain Assured Delivery requests for firm power sales in excess of a utility's Exhibit B maximum.

Section 5. Formula allocation

(a) **Limits On Intertie Capacity Available For Formula Allocation.** Generally, BPA will determine Intertie Capacity available for Formula Allocations after first taking into account the amount of Intertie Capacity necessary to satisfy requirements of the Administrator's Power Marketing Program, existing transmission contracts listed in Exhibit C, and Assured Delivery contracts executed by BPA pursuant to this policy. However, during Condition 1, BPA will not consider the Assured Delivery contracts subject to mitigation requirements in determining available Intertie capacity. BPA may reduce any allocation, if additional Intertie Capacity is required to minimize revenue losses associated with actions taken to protect fish in the Columbia River drainage basin.

(b) **Northwest Scheduling Utility Requirements.** BPA will make utilities aware of scheduling requirements before the policy is implemented.

(c) **Allocation Methods.**

(1) **Condition 1**

(A) **Until December 31, 1988.** Intertie Capacity will be allocated pursuant to the Exportable Agreement (BPA Contract No. 14-03-73155), when applicable.

(B) **After December 31, 1988.** Condition 1 will be in effect when the Federal system is in spill or in likelihood of spill, as determined by BPA. Available Intertie

capacity will be allocated pursuant to the following procedure:

(i) Each hour, the maximum Condition 1 allocations for BPA and each Scheduling Utility will be based on the ratio of their respective hydroelectric generating capacities to the Northwest's total hydroelectric generating capacity, multiplied by the available Intertie capacity (the "Hydro Cap"). To the extent that the declarations of some Scheduling Utilities are less than their respective Hydro Caps, BPA will allocate the remainder, pro rata, to itself and to other Scheduling Utilities whose declarations are greater than, or equal to, their respective Hydro Caps. Examples of allocations under Condition 1 are shown in Exhibit A.

(ii) During Condition 1, whenever the Southwest market at BPA's applicable rate is less than the available Intertie capacity, BPA will allocate no more capacity than that market amount.

(iii) In calculating each Scheduling Utility's Hydro Cap, BPA will reduce the hydroelectric generating capacities of individual utilities by any Protected Area decrements determined pursuant to section 7.

(2) Condition 2

When Condition 1 is not in effect, but BPA and Scheduling Utilities declare

amounts of energy that exceed available Intertie capacity, Formula Allocations for BPA and each Scheduling Utility will approximate, by hour, the ratio of each declaration to the sum of all declarations, multiplied by the available Intertie capacity. An example of an allocation under Condition 2 is shown in Exhibit A.

(3) Condition 3

When Condition 1 is not in effect and when the total surplus energy declared available by BPA and Scheduling Utilities is less than the total available Intertie Capacity, BPA and Scheduling Utilities' allocations will equal their declarations. The remaining Intertie capacity will be made available to Extraregional Utilities. Examples of the two possible allocation procedures under Condition 3 are shown in Appendix A.

(d) Modified Allocations Upon Commercial Operation of the Third A.C. Interconnection. When the market power of California Intertie owners is reduced upon commercial operation of the third AC interconnection, BPA will cease allocating individual Intertie capacity amounts to non-Federal utilities during Conditions 2 and 3. Instead, after allocating sufficient capacity to itself, BPA will to the extent practicable make the remaining Intertie Capacity available as a block to Scheduling Utilities, and make any residual amount under Condition 3 available to Extraregional Utilities. However, this provision will not be

operative if the Administrator determines that:

- (1) even after commercial operation of the third AC, Intertie access continues to be impaired for California utilities presently lacking ownership in the southern portion of the Intertie, or
- (2) Southwest utilities utilize some pro rata scheme to allocate energy purchases over the Intertie.

Section 6. Access for Qualified Extraregional Resources

(a) **Assured Delivery.** Any request for Assured Delivery of power from a Qualified Extraregional Resource would be granted only by contract which, in addition to the Mitigation measures specified in section 4(d)(4)(B), must include benefits to BPA such as increased storage, improved system coordination or operation, or other consideration of value commensurate with the services provide. However, Canadian Extraregional Utilities will not be provided Assured Delivery service until the Administrator has determined that the capability of the Intertie is rated at approximately 7,900 MW. Proposed contracts would be evaluated by BPA and reviewed publicly to determine whether it would cause substantial interference with the Administrator's Power Marketing Program. An environmental review would also be conducted.

(b) **Formula Allocation.** Under Condition 3, energy from Canadian Qualified Extraregional Resources will have access to the Intertie to the extent that Intertie Capacity is available in excess of the amount used by BPA, Scheduling Utilities, and energy from U.S. Qualified Extraregional Resources. BPA may provide Qualified Extraregional Resources with some additional Formula Allocation, if the utility owner agrees by contract either to increased participation in the Pacific Northwest's coordinated planning and operation, or to provide other consideration of value, apart from the standard BPA wheeling rate, commensurate with the services provided.

Section 7. Fish and Wildlife Protection

(a) **Purpose.** Hydroelectric projects constructed in Protected Areas may substantially decrease the effectiveness of, or substantially increase the need for, expenditures and other actions by BPA, under Northwest Power Act section 4(h), to protect, mitigate or enhance fish and wildlife resources. Intertie access will not be provided to facilitate the transmission of power generated by any new hydroelectric projects located in Protected Areas, licensed after the effective date of this policy. Upon expiration of a Federal Power Act license for an existing project located within a Protected Area, BPA will assist the licensee in developing any necessary protective conditions so that the project may continue to qualify for Intertie access.

(b) **Implementation.** This policy contemplates that BPA will implement, after review and possible modification, a comprehensive protected area program adopted by the Pacific Northwest Electric Power and Conservation Planning Council. In the meantime, BPA will adopt the Protected Area designations compiled by the Council staff. Exhibit D lists those stream reaches, using Environmental Protection Agency stream reach codes, currently designated by BPA as protected areas.

(c) **Enforcement.** If a Scheduling Utility or Nonscheduling Utility owns, or acquires the output from, a hydroelectric project covered under the restrictions of section 7(a), BPA will reduce that utility's Assured Delivery capacity and the Formula Allocation made available to it under the Condition 1 Hydro Cap by either the nameplate rating of the project (in the case of ownership), or the amount of capacity acquired.

Section 8. Other Enforcement Provisions

Whenever the terms of this policy are not being met, BPA will inform the appropriate utility of the nature of the noncompliance and actions that may be taken to achieve compliance. If noncompliance is not corrected within a reasonable period, BPA may impose an appropriate sanction. Sanctions include denial of access for a resource and refusal to accept schedules.

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**EXPLANATION OF BPA'S REVISED
DRAFT LONG TERM INTERTIE ACCESS
POLICY**

**DECEMBER 15, 1987
INTRODUCTION**

The proposed Long Term Intertie Access Policy ("LTIAP" or "1987 draft") included in this document reflects major changes in direction on provisions defining Assured Delivery, Formula Allocation, and Fish and Wildlife protection. The changes are intended to serve two primary purposes. First, the LTIAP as revised is designed to provide greater specificity to give utilities in the Northwest and California with greater planning certainty. Second, the LTIAP as revised is designed to provide more revenue protection for BPA, while providing Assured Delivery for a wider variety of transactions than the 1986 draft LTIAP.

This narrative summarizes the issues raised by the proposed LTIAP and the current revision. Appendices containing more detailed information and examples follow the narrative. The revised LTIAP is presented for public comment, which BPA will consider in developing the final Long Term Intertie Access Policy in April 1988.

Assured Delivery. To address the needs of Northwest utilities and to protect BPA's revenue recovery, BPA has determined an amount of capacity for Assured Delivery transactions that will include an amount for Firm Sales based on a utility's Average Firm Surplus as computed in each utility's Exhibit B to the LTIAP. The amount includes 105 megawatts for Montana Power Company pursuant to section 9(i)(3) of the Northwest

Power Act. An amount also will be set aside for Seasonal Exchanges. Provisions for capacity contracts and capacity-energy exchanges have been deleted because little interest has been expressed regarding these transactions.

Formula Allocation. Allocating access under Condition 1 based on the size of the California market is the major change BPA made to the Formula Allocation proposal. This change responds to analyses BPA conducted of the impacts on BPA under Condition 1 of allocating to the available Intertie capacity versus allocating to the identified market. BPA would lose \$16 million annually by allocating to Intertie Capacity rather than to the market.

Fish and Wildlife Protection. BPA included fish and wildlife provisions in the 1987 draft LTIAP to protect BPA's investments in facilities to protect, mitigate, and enhance fish and wildlife. The revised provisions reduce a utility's access to the Intertie for any new hydroelectric projects developed within "Protected Areas." The provisions also will apply to existing projects in Protected Areas as their licenses expire.

BPA will rely on intervention in Federal Energy Regulatory Commission hydro licensing proceedings under the Federal Power Act to resolve all other problems associated with its fish and wildlife responsibilities. . . .

II. FORMULA ALLOCATION

The 1987 draft policy continues the Formula Allocation methodology used in the Near Term Intertie Access Policy (NTIAP) of allocating access to the Intertie based on three possible conditions. Provisions for Condition 1 reflect the expiration of the Exportable Agreement at the end of 1988, the public

comment received on the 1986 draft LTIAP, and the analyses completed by BPA.

In section 5(a) of the 1987 draft, BPA continues the special limitation on Formula Allocations when necessary to protect fish and wildlife. This provision was originally included in the 1986 draft LTIAP to address situations when BPA may wish to provide flows above those allowed under its own hourly allocation in order to address a specific fishery concern. For example on Vernita Bar, in the Hanford reach of the Columbia, BPA and several public utility districts are arranging, under specified circumstances, to provide increased flows between December and April to protect hatching and emerging fall chinook. Without increased flows, some redds (egg nests) would be left uncovered when flows are reduced to reflect lower demand for electricity. Section 5(a) allows BPA to market the additional electricity produced as a result of the flows BPA may provide to protect fish and wildlife.

CONDITION 1

Condition 1 under the NTIAP incorporated the pre-existing Exportable Agreement, which expires on December 31, 1988. Parties to the Agreement declare amounts of exportable energy — surplus energy available for export at the applicable BPA rate. If total declarations of exportable energy exceeds the available Intertie Capacity or the size of the Pacific Southwest market, whichever is smaller, each party to the Agreement is allocated access to the smaller amount based on its share of total declarations.

The 1986 draft LTIAP proposed that upon expiration of the Exportable Agreement a condition of spill or likelihood of spill on the Federal Columbia River power system would trigger Condition 1. BPA and Northwest scheduling utilities could declare surplus energy available for export and BPA would allocate access to the Intertie by approximating the ratio of each declaration to the sum of all declarations multiplied by the available Intertie Capacity. Each Scheduling Utility's allocation would be limited by the ratio of its regional hydroelectric capacity to the total regional hydroelectric capacity of the Scheduling Utilities multiplied by the total of all declarations (the "Hydro Cap").

Subsequent to releasing the 1986 draft LTIAP for public review, BPA received and considered many comments and suggestions for allocation under Condition 1. The majority of respondents either favored continuing the provisions of the Exportable Agreement by negotiating a new agreement or implementing a similar Condition 1 allocation policy. The comments identified the Exportable Agreement as an equitable means of allocating access to the Intertie. Others recommended that the Exportable Agreement be allowed to terminate after December 31, 1988, and a similar agreement not be negotiated. A few commenters suggested that Condition 1 be eliminated upon expiration of the Exportable Agreement, identifying Condition 2 as an equitable means to allocate access to the Intertie. One commenter suggested that BPA pursue a policy wherein BPA would receive an allocation sufficient to market its surplus energy and allow access to other scheduling utilities on a first-come first-served basis.

The 1987 draft now incorporates provisions from both the Exportable Agreement and the 1986 draft LTIAP for allocation under Condition 1. A condition of spill or likelihood of spill of the Federal Columbia River Power System will determine Condition 1[.] In Condition 1, BPA must be especially concerned with protecting its own sales, because sales foregone during spill conditions cannot be stored and made later. BPA and Scheduling Utilities will declare surplus energy available for export at the applicable BPA rate and receive a share of available Intertie Capacity approximating the ratio of each Scheduling Utility's hydroelectric capacity to the region's hydroelectric capacity multiplied by the quantity of available Intertie Capacity. To the extent that the market for Pacific Northwest energy at BPA's price is less than the available Intertie Capacity, BPA will allocate access to the Intertie to equal that market. Once a utility receives an allocation it is free to negotiate a sale with any purchaser.

BPA believes that once the Exportable Agreement expires, these provisions for Condition 1 will balance BPA's long-term objectives of: 1) managing the Intertie in a manner that provides sufficient access for BPA to market its surplus energy and ensures its ability to meet its financial obligations, including repayment to the Treasury; and 2) providing Intertie access for the region's scheduling utilities to market surplus electricity.

Allocating To The Market. Allocating access under Condition 1 based on the size of the Southwest market, as under the Exportable Agreement, constitutes the major change BPA made from the 1986 draft LTIAP Formula Allocation proposal. This change comes in

response to analyses identifying the impacts on BPA under Condition 1 of allocating to the available Intertie Capacity or to the identified market. Appendix A shows an example of the difference in transmission capacity for BPA between allocating to the market or the Intertie.

The market for power in California is often less than available Intertie capacity because of minimum generation requirements. As the Intertie is expanded and Southwest utilities bring on new generation that cannot be displaced with spot market purchases, the frequency of this situation is expected to grow.

The heart of BPA's revenue problem in this situation is the Northwest Regional Preference Act, 16 U.S.C. [§] 837, *et seq.*, which requires BPA to quote an energy price to Northwest utilities before making any sale to the Southwest. This creates a problem in which Northwest utilities, which are both BPA's customers and competitors, know BPA's price but we do not know theirs. In the Condition 1 situation where the size of the Southwest market is less than available Intertie Capacity, Northwest utilities are able to use this information to undercut the BPA price and use their allocations to reduce BPA hourly sales to a small Southwest market. If a "real time" BPA pricing iteration were even possible, BPA would still be required to announce its new price to the Northwest. Regional preference makes BPA a "sitting duck" for its competitors. Allocating according to market size reduces BPA's vulnerability by reducing the size of Scheduling Utility allocations.

In reviewing the allocation procedure, BPA set out to determine the revenue impacts of allocating Condition 1 access to the market or to the size of the

available Intertie Capacity. Analyses indicate that BPA would lose approximately \$16.4 million in 1989 by allocating to the Intertie rather than the market. This loss would decrease to \$10.7 million in fiscal year 1992. Beyond 1992 the difference would increase, mainly due to projected fuel price increases.

Allocation to the market will not necessarily cause the Intertie to go unloaded. Purchasers with low decremental costs may choose to displace those resources with additional energy purchased at BPA's market expansion rates after the first allocations are made.

The Hydro Cap. BPA received comment on the provision to allocate to a Scheduling Utility based on its hydroelectric capacity ("Hydro Cap"). Allocating access to the Intertie based on a utility's hydroelectric capacity is consistent with the definition of Condition 1. When the Federal Columbia River power system is spilling or likely to spill, the maximum allocation to utilities with greater hydroelectric resources increases, thus decreasing the probability of wasting the resources by spilling. Under this provision, BPA's share of allocations would tend to increase due to its large hydroelectric capacity. BPA believes this will contribute to proper management of the Columbia River system and to efficient use of the region's resources. The specific wording for the provision has been changed from the 1986 draft LTIAP to reflect the allocation procedure more accurately.

The Hydro Cap is also a necessary element of Assured Delivery mitigation provisions and the Protected Area program, described below. Hydro cap numbers give BPA and scheduling utilities a predictable, practical way of anticipating the amount of

energy to be purchased under Condition 1 mitigation provisions (policy section 4(d)(4)(A)). Also, Hydro Caps appear to be the only practical way in which BPA can enforce the prohibition against hydroelectric development in Protected Areas (policy section 7(c)).

CONDITIONS 2 AND 3

Conditions 2 and 3 are similar to those in the NTIAP and the 1986 draft LTIAP. Under Condition 2, when Condition 1 is not in effect and BPA and Scheduling Utilities declare amounts of surplus energy available for sales on the Intertie that exceed the available Intertie Capacity, a utility's allocation will approximate the ratio of its declaration to the sum of all declarations multiplied by the available Intertie Capacity.

Under Condition 3, when Condition 1 is not in effect and when the total surplus energy declared available by BPA and Scheduling Utilities is less than the total available Intertie Capacity, BPA's and Scheduling Utilities' allocations will equal their declarations. The remaining available Intertie capacity will be offered [sic] to extraregional utilities.

POLICY SECTION 5(d)

BPA believes that there are sound justifications for pro rata allocation of Intertie capacity among Northwest sellers of surplus energy, which we describe below. However, section 5(d) of the 1987 draft proposes to end Condition 2 and 3 pro rata allocations for nonfederal utilities when the third AC Intertie expansion is completed, provided anticompetitive problems in the Southwest are cured by that time. BPA

will explore the practicality of this proposal during the public process on the 1987 draft policy.

Revenue Justification. Anyone who has participated in a BPA rate case knows that the Northwest Power Act ties BPA's revenues and costs to the revenues and costs of Northwest utilities. Actions that depress utility revenues tend to reduce BPA revenues or increase BPA costs. This is a major concern for BPA, which lost \$199 million in fiscal 1987 and \$65 million in fiscal 1986.

The first concern relates to scheduling utilities that annually receive \$160 million in residential exchange subsidies under Northwest Power Act section 5(c). See *Pacificorp v. FERC*, 795 F.2d 816 (9th Cir. 1986). Surplus energy sales are used as a credit in calculating a subsidy recipient's "average system cost" (ASC). A change in formula allocation procedures that reduces the revenues of exchanging utilities lowers the ASC credits and increases the subsidies paid by BPA.

The second concern relates to scheduling utilities which purchase some of their power requirements as preference customers of BPA. A change in formula allocation procedures that reduces the sales of BPA preference customers causes the latter to displace purchases from BPA with their own unsold energy. The so-called "availability charge" has been an incomplete and very controversial remedy to this displacement problem even after BPA's adoption of the charge was upheld in *City of Seattle v. Johnson*, 813 F.2d 1364 (9th Cir. 1987). Two more challenges to the availability charge are now pending before the court.

Antitrust Concerns. BPA records of decisions on earlier versions of the IAP speak to the problems of California utility market concentration and the resulting anticompetitive burdens placed on utilities

that lack ownership interests in the southern portion of the Intertie. Certainly no California utility has an intertie policy that provides anything near the access given by BPA.

Judge Norris' dissent in *CEC v. BPA* suggests that a remedy may be had through a treble-damage antitrust action against California Intertie owners. *California Energy Commission v. BPA*, Ninth Cir. Nos 84-7836, et al. (slip op. at 25, November 6, 1987). However, this course of action seems terribly impractical. Fifteen years after the Federal Energy Regulatory Commission initiated an investigation of anticompetitive transmission restrictions by California Intertie owners and four years after Administrative Law Judge Howe found the existence of anticompetitive problems, the case still awaits resolution and no remedies have been put into effect. *Pacific Gas & Electric Company*, FERC Docket No. E-7777. We do not believe that a district court treble damage action would move to any quicker resolution. BPA cannot wait 14 years for a cure to problems in its critical California market when BPA's average losses run to \$100 million per year.

BPA's response is to put California concerns about competition to a test. When the third AC interconnection goes into commercial operation, the market power of existing California Intertie owners should be reduced because other California utilities will gain the access now denied them because of the absence of any California Intertie access policy. BPA seeks public comment on a proposal to cease allocating individual Intertie capacity amounts to non-Federal utilities during Conditions 2 and 3 after commercial operation of the third AC Intertie. However, this provision would not be operative if the Administrator determines that:

(1) even after commercial operation of the third AC, Intertie access continues to be impaired for California utilities presently lacking ownership in the southern portion of the Intertie, or

(2) Southwest utilities utilize some pro rata scheme to allocate energy purchases over the Intertie.

Formula allocations would continue for Condition 1 because they are necessary to enforce Assured Delivery mitigation measured and the 1987 draft policy's Protected Area program. See page 12, above.

During the remaining course of this proceeding, BPA is particularly concerned about quantifying any adverse impact on BPA revenues that might be associated with adoption of section 5(d).

Alternatively, commenters are encouraged to address the question of whether section 5(d) might be implemented sooner. Anyone commenting on this option should also address ways in which BPA might resolve its revenue and California transmission problems.

....

APPENDIX A

Allocation to Market vs. Intertie under
Condition 1: The difference in BPA's available
capacity

Assumptions

Intertie Capacity	4,000 MW
BPA price	16 m/kWh
Market estimate	3,000 MW
Hydro Capacities	
BPA	20,000 MW
Non-Federal utilities	10,000 MW

Allocate to Intertie

Allocation:

BPA	2,667 MW
Non-Federal utilities	1,333 MW

Likely sales:

BPA	1,667 MW @ 16 m/kWh
Non-Federal utilities	1,333 MW @ 15.5 m/kWh

Because BPA must announce its price first, the difference between the market and Intertie all comes out of BPA allocation.

Note that because BPA's price is known, non-Federal utilities have no incentive to lower their price further than just below BPA's (unless the market at BPA's price is less than total non-Federal utilities' allocation).

Allocate to Market

Allocations:

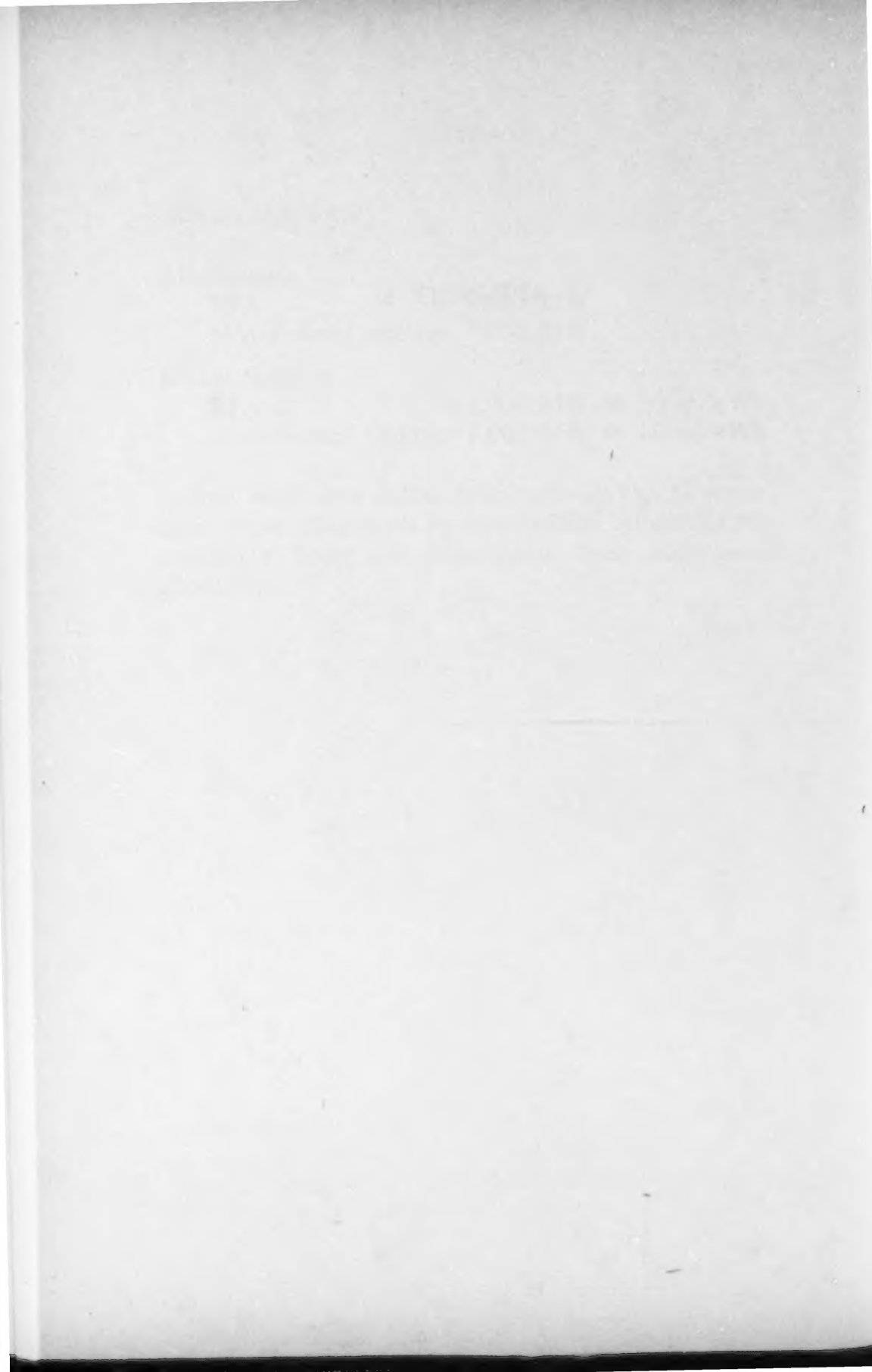
BPA	2,000 MW
Non-Federal utilities	1,000 MW

Likely Sales:

BPA	2,000 MW @ 16 m/kWh
Non-Federal utilities	1,000 MW @ 16 m/kWh

Actual sales may differ from allocations. However, sales above allocations by non-Federal utilities in any particular hour are subtracted from subsequent allocations.

APPENDIX K



APPENDIX K

STATUTES

Section 6 of the Act of August 31, 1964 (sometimes referred to as the "Regional Preference Act"), 16 U.S.C. §837e, provides in full:

Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas. The transmission of other electric energy shall be at equitable rates determined by the Secretary, but such rates shall be subject to equitable adjustment at appropriate intervals not less frequently than once in every five years as agreed to by the parties. No contract for the transmission of non-Federal energy on a firm basis shall be affected by any increase, subsequent to the execution of such contract, in the requirements for transmission of Federal energy, the energy described in section 837h of this title, or other electric energy.

Section 6 of the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. §838d, provides in full:

The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

Section 2(b) of the Bonneville Project Act of 1937, 16 U.S.C. §832a(b), provides in full:

In order to encourage the widest possible use of all electric energy that can be generated and marketed and to provide reasonable outlets therefor, and to prevent monopolization thereof by limited groups, the administrator is authorized and directed to provide, construct, operate, maintain, and improve such electric transmission lines and substations, and facilities and structures appurtenant thereto, as he finds necessary, desirable, or appropriate for the purpose of transmitting electric energy, available for sale, from the Bonneville project to existing and potential markets, and, for the purpose of interchange of electric energy, to interconnect the Bonneville project with other Federal projects and publicly owned power systems constructed on or after August 20, 1937.

Sections 1(c) and (d) and 2 of the Regional Preference Act, 16 U.S.C. §§837(c) and 837(d) and 837a, provide in full:

"Surplus energy" means electric energy generated at Federal hydroelectric plants in the Pacific Northwest which would otherwise be wasted because of the lack of a market

therefor in the Pacific Northwest at any established rate.

“Surplus peaking capacity” means electric peaking capacity at Federal hydroelectric plants in the Pacific Northwest for which there is no demand in the Pacific Northwest at any established rate.

Subject to the provisions of this chapter, the sale, delivery, and exchange of electric energy generated at, and peaking capacity of, Federal hydroelectric plants in the Pacific Northwest for use outside the Pacific Northwest shall be limited to surplus energy and surplus peaking capacity. At least 30 days prior to the execution of any contract for the sale, delivery, or exchange of surplus energy or surplus peaking capacity for use outside the Pacific Northwest, the Secretary shall give the then customers of the Bonneville Power Administration written notice that negotiations for such a contract are pending, and thereafter, at any customer's request, make available for its inspection current drafts of the proposed contract.

Section 5 of the Flood Control Act of 1944, 16 U.S.C. §825s, provides in full:

Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of Energy, who shall transmit and dispose of such power and energy in such manner as to encourage the

most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Secretary of Energy. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of Energy is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

Section 4(a) of the Bonneville Project Act of 1937, 16 U.S.C. §832c(a), provides in full:

In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the

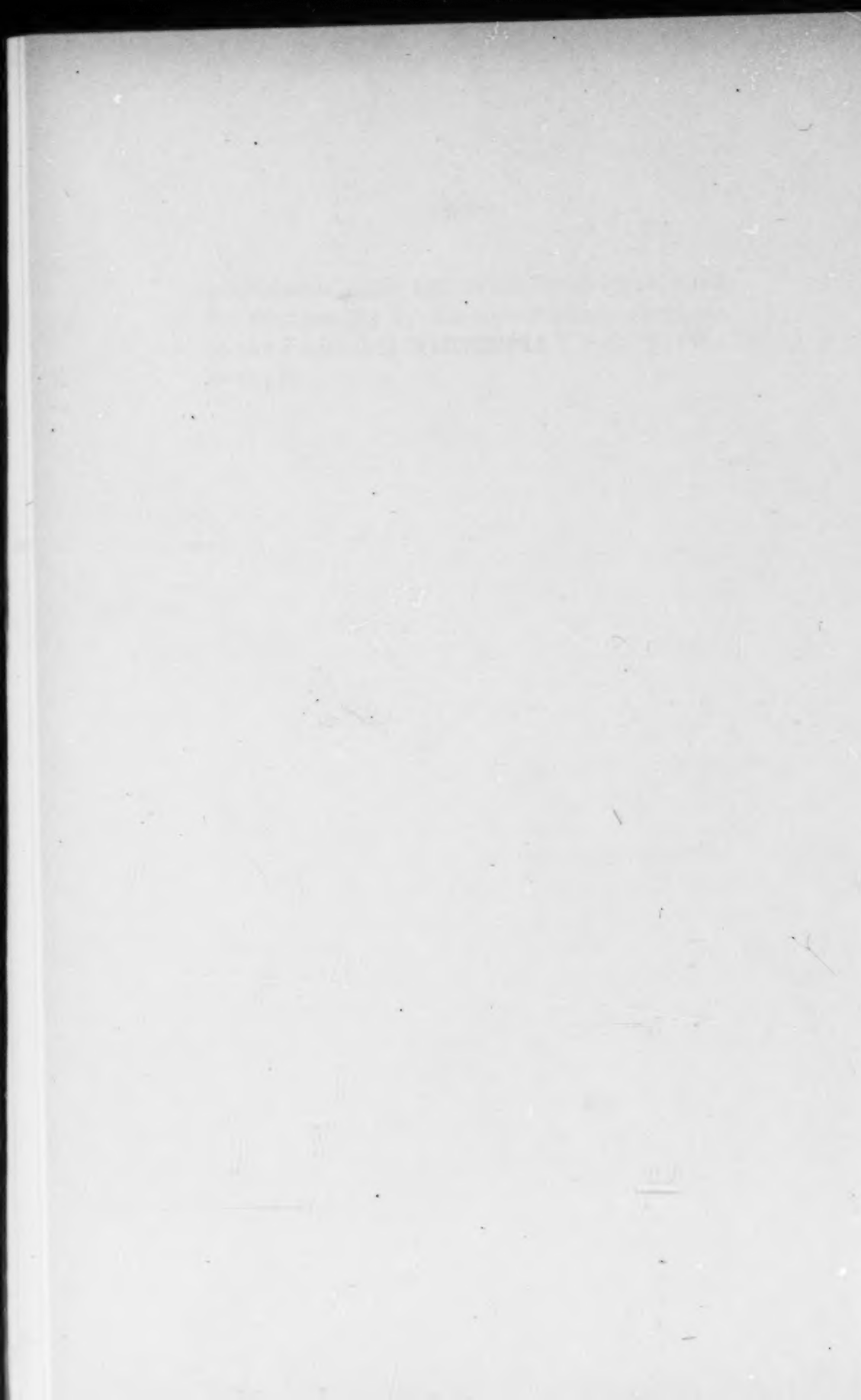
general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.

Section 7(k) of the Pacific Northwest Power Planning and Conservation Act of 1980, 16 U.S.C. §839e(k), provides in full:

Notwithstanding any other provision of this chapter, all rates or rate schedules for the sale of nonfirm electric power within the United States, but outside the region, shall be established after December 5, 1980, by the Administrator in accordance with the procedures of subsection (i) of this section (other than the first sentence of paragraph (6) thereof) and in accordance with the Bonneville Project Act [16 U.S.C. §§832 et seq.], the Flood Control Act of 1944 [16 U.S.C. §825s], and the Federal Columbia River Transmission System Act [16 U.S.C. §§838 et seq.]. Notwithstanding section 201(f) of the Federal Power Act [16 U.S.C. §824(f)], such rates or rate schedules shall become effective after review by the Federal Energy Regulatory Commission for conformance with the requirements of such Acts and after approval thereof by the Commission. Such review shall be based on the record of proceedings established under subsection (i) of this section. The parties to such proceedings under subsection (i) of this section shall be afforded an opportunity by the Commission for an additional hearing in

accordance with the procedures established for ratemaking by the Commission pursuant to the Federal Power Act [16 U.S.C. §§791a et seq.].

APPENDIX L



APPENDIX L

26 FERC 163,048

Pacific Power & Light Company,
Docket No. E-7796-007;

Pacific Gas and Electric Company,
Docket No. E-7777-000

Initial Decision of Investigation of the
California Power Pool, the Pacific Intertie
Agreement and Related Contracts

(Issued February 10, 1984)

Thomas L. Howe,
Presiding Administrative Law Judge.

...

II. The Pacific Intertie

The Pacific Intertie is considered to be the greatest electrical transmission achievement in this country in this century. It established high voltage, high volume, long distance transmission between northern Oregon and its terminal near Los Angeles, the greatest distance over which commercial electrical transmission had ever been accomplished in this country, and in the greatest volume that long distance transmission had ever reached anywhere in the world. One component, a direct current line, was the first major dc transmission line in this country, and was completed through difficult terrain in the face of skepticism on the part of

some engineers as to whether the proposed technology would work. After an initial period in which some "bugs" were dealt with, the dc line proved to be successful beyond the expectations of most of its proponents in providing low-cost long distance transmission.

The engineering feat of design and construction was complemented by the difficult political maneuvering and compromising necessary to work out the details among the conflicting interests and demands of Northwestern states, California, Canada, municipal utilities, private utilities, the Bureau of Reclamation and other state and federal agencies. Senators, Congressmen, governors, cabinet officers and President Johnson became involved.

Basically, the Intertie system consists of two 500 kV lines from Oregon into California, and one 800 kV line to the east from Oregon through Nevada and southern California. The system is described in more detail in Southern Cities' initial brief at page 13:

The two 500 KV ac lines begin at the John Day Dam on the Columbia River. The first leg of each line, from John Day 89 miles to Grizzly Substation in Oregon, is owned by the Bonneville Power Administration ("BPA"). From Grizzly 178 miles to Malin Substation near the California Oregon border ("COB"), one line is owned by BPA and the other by Portland General Electric Company ("PortGE"). From Malin 94 miles to PG&E's Round Mountain Substation, one line is owned by the United States Bureau of Reclamation ("USBR"). The second line is owned by Pacific Power & Light Company

("PP&L") as far as the Indian Spring Tower and by PG&E from the Indian Spring Tower to Round Mountain. Both lines then proceed southward through PG&E's service area 425 miles, through the Table Mountain, Vaca dixon (one line only goes to this substation), Tesla and Los Banos Substations to Midway Substation. From Midway the lines are owned by Edison and continue south into Edison's service area to Edison's Vincent Substation, a distance of 113 miles.¹ From Vincent the two lines, also owned by Edison, extend an additional 47 miles to Edison's Lugo Substation. The AC Intertie traverses a total distance of 946 miles. (Moody: 7/1587-88). A 230 KV line owned by USBR from Round Mountain to Cottonwood is also officially a part of the Intertie. It does not, however, connect directly to the USBR Intertie line which runs from Malin to Round Mountain.

The dc Intertie line runs 846 miles from the Celilo Converter Station near The Dalles in northern Oregon, through Nevada and California to the Sylmar Converter Terminal near Los Angeles. BPA owns the line in the Northwest as far as the Nevada-Oregon border (NOB). From the NOB to and including the Sylmar Station, the line is owned 50% by the Los Angeles Department of Water and Power (LADWP) together with

¹ There is a third 500 KV AC line from Midway to Vincent, owned one-half by PG&E and one-half by SCE, which is not considered part of the Intertie (Moody. 263/31855-56)

the Cities of Glendale, Burbank and Pasadena, and 50% by Edison. Edison owns and operates 230 KV transmission lines which interconnect Sylmar with Vincent (Moody: 7/1588).

The Intertie is shown on the map on [the next] page. The 500 kV ac Intertie lines in the PG&E area are owned by PG&E.

The two 500-kV a-c lines were constructed and went into operation 1968 and 1969, respectively, following the original proposal for interconnection of the Pacific Northwest and Southwest Regions. As a part of the synchronized loop or doughnut network, the a-c interties are subject to unscheduled power of circulating flow. The rated capacity of the a-c intertie is 2,500 MW, assuming no loop flow. The d-c intertie, for which, the loop flow is not a factor, was constructed and placed in operation in May 1970. With transmission losses, the delivery capacity of that line is about 1,400 MW. The line has recently been uprated by about 20 percent by increasing the current rating of the converters from 1,800 to 2,000 amperes. Plans exist to increase the voltage rating from ± 400 to ± 500 kV, which will increase the capacity to about 2,000 MW. Current uses of both the a-c and d-c interties include capacity sales and firm and nonfirm energy sales.



FIGURE 4—Pacific Northwest-Southwest Intertie,
 from Power Pooling in the Western Region.
 FERC-0054, page 30

Power Pooling in the United States, FERC-0049, pp. 139-41.

The Intertie at the close of the record had 10 users. CVP and DWR use 28% of the ac Intertie capacity. CH-1680. SMUD was allotted capacity, which varied over the years. Burbank, Glendale, LADWP and Pasadena together are allocated 50% of capacity of the dc Intertie line. The rest of the Intertie capacity, both ac and dc, is allocated 50% to PG&E, 43% to Edison and 7% to San Diego. CH-1680. These final three percentages reflect the relationship between the three companies' daily energy peak load demands at the time the Intertie Agreement was consummated. CH-1174. These companies have used the ac capacity not utilized by any of the others. PG&E provided some limited interruptible transmission to NCPA since the close of the record, and since at least early 1978, Edison has offered interruptible transmission service on the Pacific Intertie to the Southern Cities (Mitchell, CH 1806, 1812-1813: Ex. 6039.) Edison's offer to provide such interruptible transmission service was accepted by the Southern Cities of Anaheim and Riverside, and "Matrix interruptible transmission service Agreements" were executed and filed with the Commission in January 1981. Edison FERC Rate Schedule Nos. 129 and 130. The Cities of Colton and Azusa subsequently filed similar "Matrix Agreements." Edison FERC Rate Schedules 160 and 162.

Intertie usage at the California/Oregon or Nevada/Oregon borders as of the close of the record was as follows:

	500 kV ac lines	800 kV (±400 kV) dc line	Total
LADWP	0	560	560
Pasadena	0	32	32
Burbank	0	54	54
Glendale	0	54	54
CVP	400	0	400
DWR	300	0	300
SMUD	0	0	0
PG&E	900	350	1250
Edison	774	301	1075
San Diego	126	49	175
Total	2500MW	1400MW	3900MW

Moody. CH-1595. SMUD's usage was zero because it had not used its allotted transmission and the companies contended it had thereby lost it. By Commission decision after the close to the record, SMUD was found entitled to receive up to 200 MW of transmission service over the Intertie.

Different parts of the Intertie were built by different entities. Owners of different segments or shares therein were agencies of the United States (BPA and CVP), municipal utilities (LADWP, Glendale, Burbank and Pasadena), Edison, PG&E, Portland General Electric Company, and Pacific Power & Light Company (PP&L). PP&L turned over operation of its segment to PG&E. San Diego contributes to the operation and maintenance costs proportionate to its allotted use of the line, SMUD and DWR contributed nothing to the construction cost, but pay at a set rate for their

transmission service. All others with firm arrangements to use the Intertie contributed capital.

NCPA and Southern Cities contend PG&E, Edison and San Diego controlled the Intertie arrangements and wrongly excluded them and other municipals from any allotment of Intertie capacity.

The Intertie when planned and first build was sought as an outlet for the quantity of unused hydro power from the Northwest caused by the surplus water accumulated in the mountain snows which on melting fills the Northwest reservoirs to the point where the water must be run through turbines or wasted by spilling. The Intertie looked to transmission of this hydro electric [sic] power from the Northwest, and possibly Canada, to areas in California, where power was more expensive. It also provided the means for the sale of Canadian Entitlement Treaty power to the California utilities. It made possible the exchange of power between California and the Northwest so that each of these regions could obtain power from the other during its own peak periods and return it at the other region's peak periods, which are different both in time of day and time of year. Not only do the daily peak periods in the Northwest occur at different hours than they do in California, but the Northwest peaks occur in the winter when power is needed for heating, and much of the California peaks occur in the summer when power is needed for air conditioning. With the sharp escalation in the cost of thermal generation, starting with the oil embargo of 1973, Northwest hydroelectric energy became an increasingly inexpensive source of energy in relation to the alternatives. The Intervenor's desire for this cheap Northwest power has occasioned much of the litigation here, in other

agencies and in the courts. This cheap power would be available to California entities only if transmission were available, and transmission requires access to the Pacific Intertie.

In the last few years, however, this Northwest hydro electric power is no longer as cheap as it was and prices within the next year are expected to rise sharply. The Northwest has increased its own need for power and has undertaken to build thermal (including nuclear) plants to meet anticipated needs, as well as increasing the Northwest area's demand for available hydro electric power. In short, not as much hydro electric power is available from the Northwest for sale in California, and what there is no longer as cheap. Access to the Intertie will be less advantageous now to the Intervenorors than it might have been earlier, but increases in other generating costs still leave access to the Intertie desirable. The ability to exchange power between the Northwest and California to serve their different peaking times is still important, but this is of less value to the Intervenorors so long as their own generation facilities are limited. They had none at the close of the record, but some were planned, and we are informed the first are now on line.

The Intervenorors (except Redding, which is served by CVP exclusively) are all served by PG&E or Edison, with some NCPA members also getting power from CVP and some of the Southern Cities purchasing energy elsewhere. There is no question of their not receiving sufficient electricity. Essentially what is at stake here is the cost of power. PG&E and Edison make the point that cheap power from the Northwest and the economic advantages of power exchanges reduce PG&E's and Edison's cost and rates to

everyone they serve (including resale customers), and the Intervenor who are resale customers share in the benefits of Intertie use in this respect.

The costs to and rates charged by the various municipalities may be reduced if access to the Intertie is given them, but there will be a corresponding increase in the cost to PG&E and Edison and an increase in their rates to cover the cost increase assuming full retail rate recovery of costs. The stockholders of PG&E and Edison will not lose money, nor will the executives of PG&E and Edison have their salaries reduced. Essentially what we deal with here is the question of whether the consumers supplied by the municipalities will have their rates reduced while other customers of PG&E and Edison find their rates increased. The rates charged by many of the municipalities appear to be below those charged by PG&E and Edison, although direct comparison is difficult because the methods of charging rates differ.

The first contention we must deal with is that PG&E, Edison and San Diego operated in concert (1) to prevent the building of a Federal Intertie line or a privately owned Intertie line which would have accorded transmission to all, and (2) to exclude the municipalities from access to the Pacific Intertie line.

As to how the Intertie came about, I rely on the testimony of Witness Charles F. Luce, Chairman and Chief Executive Officer of Consolidated Edison Company of New York. Before he became Under Secretary of the Interior, he was Administrator of Bonneville Power Administration from February 1961 to September 1966. CH-38,571. Mr. Luce was called as a witness by me after it became apparent that he had more knowledge of the origin of the Intertie

arrangements than any other living man. In his testimony he impressed me as being truthful and forthright in the extreme and I accept his version of the facts, as set forth in Volume CH-313 of the record, as the best available to us and superior to the version some have sought to piece together from documents.

Mr. Luce's testimony indicated that the main impetus for the creation of the Intertie in the form that eventually materialized came from within the United States Government. Mr. Luce was one of those at the center of the efforts that culminated in the Intertie. He was one of the three United States negotiators of the treaty between the United States and Canada relating to the cooperative development of water resources of the Columbia River Basin. CH-38,578. This treaty was essential to the Intertie. It was necessary to get British Columbia's concurrence to ratify the Treaty, and to that end it was sought to find a market for Canadian power in the United States so British Columbia could proceed with development of the Columbia River power resources. The Northwest states did not have a market for all of Canada's share of Treaty power. It was clear a market had to be found outside the Northwest "so it was necessary for us to get transmission lines down to California to sell this power." CH-38,581. The private utilities in California "started out being opposed to our project, really." CH-38,581.

. . . the State of California was our particular political problem. They had a big water project that they wanted to build and did build in fact to move water from northern California to southern California. In order to move that water it had to go through the

Tehachapi Mountains, and that took a lot of electricity to run the pumps to get it over the mountains, so with the Canadian power that didn't belong to the Pacific Northwest and therefore Northwesterners were not asserting preference to it, we had a block of power that we could offer to California customers who insisted on firm power. Now, the way we went about this was first of all to market the Canadian power into the Northwest customers on our agreement that we would find them a purchaser for the power for the period they didn't need in California.

We then took those contracts with the Northwest utilities, private utilities, public agencies and so forth and we used them as security for a big bond issue of \$300 or \$400 million and we paid that \$300 or \$400 million to Premier Bennett as prepayment for his downstream benefits for a period of 30 years, and then as it ultimately worked out we laid that power off in California for varying terms

...

So as you see, these two great projects came together. We could not get the treaty without being able to market the British Columbia share of the power. We would have had great difficulty getting the State of California to agree to our whole Intertie project without the benefit of that Canadian power.

So the two projects that seemed to be floundering came together and went through.

Asked if the primary purpose of the Intertie was to allow transfer of Canadian power to California, Mr. Luce said:

No. I would say it had both purposes, but the inception and the primary purpose of the proposed Intertie lines was to market in California, Nevada and Arizona surplus Northwest power, that was otherwise just spilling over the spillways and going into the Pacific Ocean, to California and Arizona. The first Intertie proposal long preceded the Canadian treaty. The first one I believe was in 1936 and there was another one in the late 1940's and another one in the 1950's, so all of which really were independent of the treaty. But the Treaty came along it just happened that it made it possible to consummate the political approvals that we had to have for this Intertie program.

CH-38,583-4.

The exclusion of non-generating utilities (which included the Intervenor municipalities) originated not with PG&E, Edison or San Diego but with the Bonneville Power Administration. Mr. Luce testified:

It was our policy throughout the framing of the legislation that would define a regional preference for the Pacific Northwest, the design of Intertie lines that would dispose of surplus capacity and surplus energy from the Northwest and the negotiation of contracts to utilize those lines that we wanted contracts with entities *that would have their own generation.*

CH-38,572 (emphasis added)

The policy

originated from for the purpose of the legislation which had to be passed first before any Intertie lines could be built. That legislation defining a preference for all customers in the Pacific Northwest against any customers outside the Pacific Northwest was intended to authorize only the sale of surplus energy and surplus capacity outside of the Pacific Northwest. A utility that had no generation in the first place could not use interruptible energy and could not use capacity without energy. If it had no generation it had no energy. So the very nature of the basic legislation that finally was adopted by Congress was such that the natural customers outside of the Northwest were those that would not be dependent on the capacity and energy from the Northwest that was withdrawable and that if they bought surplus capacity would have the energy to go with it.

There was the further consideration that we felt, Bonneville, that if a utility that was only a distribution system somehow became dependent on power from the Pacific Northwest it would be very difficult regardless of what the preference legislation said to withdraw that power. If a shortage developed in the Pacific Northwest so that it was necessary to withdraw the power to serve a load in the Northwest the political argument between California municipalities or Arizona municipalities and aluminum companies in the

Pacific Northwest that constituted about a third of our load, as I recall, would be a very difficult political argument no matter what the legislation said. We didn't want to create that kind of inherent conflict.

CH-38,573-4.

Whether Mr. Luce was right or wrong in all his reasoning is beside the point. The exclusion of non-generators came from BPA in the first instance and not from the private utilities. The exclusion policy was thought out in BPA between Mr. Luce and two BPA employees. CH-38,575-6.

Certainly there was never any doubt in Bonneville Power that was our policy. Our job when I became Administrator in February 1961 as regards the sale of surplus power outside of the region was first of all to get the concurrence of the various Bonneville customers and the political officeholders in the Northwest, to a bill that they thought would adequately protect them.

It took us almost a year to do that. No bill as I recall was introduced in Congress until we had taken it up with the public agencies in the Northwest, private utilities in the Northwest and the industrial companies in the Northwest. We had many, many conferences about what would constitute adequate protection for the Pacific Northwest that could not be broken by some political power play in later years.

I am sure in those discussions and conferences and negotiations that this basic

marketing policy was articulated and certainly was assumed.

CH-38,574-5.

Asked whether this exclusion policy was suggested to BPA by private utilities, Mr. Luce said:

I do not believe that is correct. They may have favored that policy, but the Pacific Northwest power users had their own reasons which were sufficient and which I would suppose preceded any discussions with the California utilities.

CH-38,575

The non-generating utilities in northern California were not forgotten. Mr Luce testified:

. . . the preference customers that didn't have their own generation in northern California for the most part were served by the Bureau of Reclamation that had generation on the Sacramento River. The Bureau of Reclamation out of the Intertie lines got an allocation of surplus power which they were able to bank, as the expression was, with the private utilities and I think that was altogether Pacific Gas and Electric that served the Sacramento Valley and were able to convert this surplus undependable power, if you will, from the Northwest through this banking arrangement into firm power, so the preference customers were taken care of through that arrangement.

In other words, in our marketing scheme in California, we didn't overlook these northern California preference customers but our way of providing benefit for them was through the

Bureau of Reclamation, which had its own generation and which had contracts with PG&E and which used PG&E lines to a large extent to deliver Federally generated power that was produced by the Bureau of Reclamation dams in California.

This policy of our dealing through the Bureau of Reclamation was well known to the Congressional delegation who watched these negotiations very, very carefully. Biz Johnson, for example, was from a little town called Roseville which itself was one of these municipals that had no generation of its own but was a customer of the Bureau of Reclamation. Biz was on the House Interior Committee and a key Congressman to getting Congressional approval for the ultimate Intertie plan.

There were other Congressmen likewise from northern California who watched very carefully what we were doing and were looking out for their constituents, as they should, and looking our particularly for the northern California municipals.

CH-38,584-5.

The arrangement for supplying northern California municipal preference customers through the Bureau of Reclamation's CVP did not make provision for all wishing to share in Northwest power, however. No provision was made for Southern Cities. Even in northern California not all municipal preference customers could obtain power from CVP. Not only did CVP have more requests for power than it could accommodate, but entities were not taken care of

beyond the limited area encompassed by CVP's own distribution system plus wheeling by PG&E within an irregular area of an estimated 100-mile radius.

Mr. Luce's testimony made clear that DWR and SMUD were allowed participation because their political power made that necessary. The same was true of LADWP with its so-called satellite cities, Burbank, Glendale and Pasadena, but this group was also necessary to the entire Intertie arrangement, since LADWP was the prime builder of the dc line that the BPA group wanted, and a major potential purchaser of Northwest Power. LADWP, Glendale, Burbank and Pasadena each had its own generation, so were not subject to the objection to non-generators. The impression from all the testimony is that Edison and PG&E were not sure of the reliability of dc transmission, and participated in the dc line only because their contribution to its cost was necessary if the whole Intertie arrangement was not to fall.

Intervenors say that the three private California companies usually spoke with one voice in arguing for a privately built rather than a Federal Intertie. They also opposed a private Intertie which would act as a common carrier. This is generally correct. Mr Gerdes, President of PG&E, was often the spokesman for the three companies.

Intervenors correctly say the three private companies were opposed to a Federal or competing private common carrier. There is no question the three companies opposed a Federal line. So did some Senators, Congressmen and executives and BPA officials, among others. Private utilities may express their views to Congress and to government officials, and advocate publicly and privately that private

transmission lines are preferable to public lines, and offer competing plans in an effort to build a private line themselves, without violating anti-trust laws or principles. Speaking in concert under these conditions is not forbidden, and may be desirable in the interest of practicality.

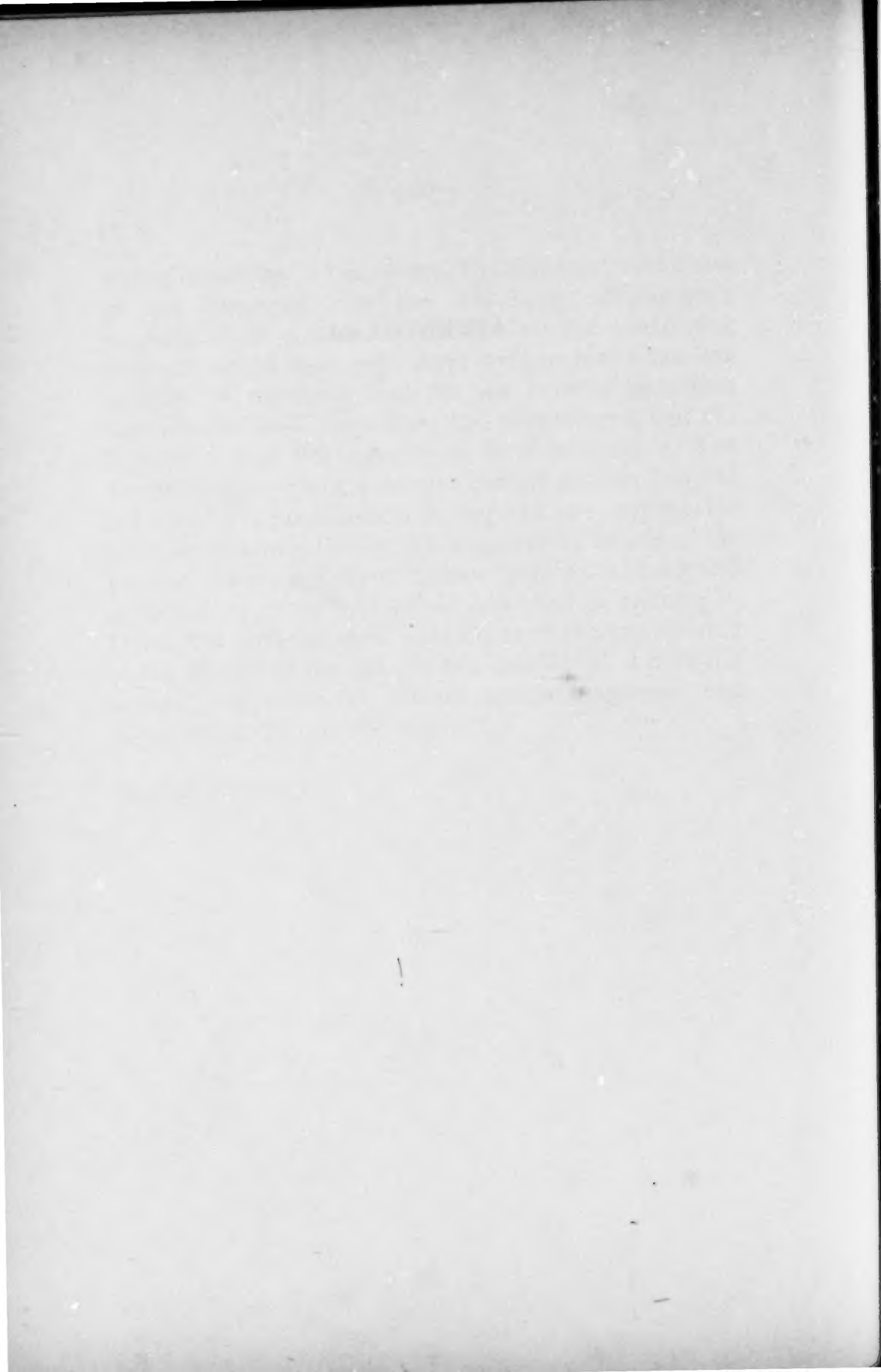
Intervenors argue, however, that PG&E did more — that PG&E President Gerdes threatened to disconnect the PG&E system from a proposed Federal Intertie consisting of one ac and one dc line, which would have rendered that Federal system economically infeasible by loss of the PG&E market. Mr. Gerdes, however, explained that the system of one ac and one dc line was not electrically stable in his opinion, and that it might result in blackouts on the PG&E system. His threat to disconnect, in other words, was because of this particular unstable configuration of one ac and one dc line, and did not amount to a threat to use PG&E's market power to prevent any Federal transmission, even one of proper configuration. There is insufficient evidence to show that this particular incident was improperly motivated. The question is not whether Mr. Gerdes was right, but whether his belief was sincere. It has not been shown that it was not.

The proposed private line also was opposed by the CPP companies. It has not been shown, however, that any of them acted improperly against the prospective competitor. The competitor has not been shown to have been defeated by the companies' actions. Its viability has not been established, and is extremely doubtful. That line would have been in opposition to the established policy of BPA not to sell to non-generators, and the BPA policy seems to have been endorsed by Northwest companies and the powerful Senators

whose constituents they were. The financial soundness of the proposed line has not been satisfactorily established. It is dubious whether all the conflicting interests could have been dealt with to make the line possible. A principal push for the Intertie lines that were finally built came from the government, and the Intertie would not have been built without it. The would-be competitor common carrier private line did not have this push behind it, nor has any comparable push been shown. Finally, the engineering details of the private line are not shown to have been worked out and agreeable to those who would have had to endorse it. When the differences of opinion as to the engineering in the history of the Intertie are considered, it does not appear the potential private common carrier had advanced to the point of viability.

[End of Excerpt]

APPENDIX M



—M1—

APPENDIX M

(AUTHENTICATED COPY)

Contract No. 14-03-73155

1-13-69

AGREEMENT

executed by the

**UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR**

acting by and through the

BONNEVILLE POWER ADMINISTRATOR

and

UTILITIES IN THE PACIFIC NORTHWEST

This AGREEMENT, executed as of January 13, 1969, by the UNITED STATES OF AMERICA (hereinafter called "the Government"), Department of the Interior, acting by and through the BONNEVILLE POWER ADMINISTRATOR (hereinafter called "the Administrator"), THE CITY OF EUGENE, OREGON (Eugene), a municipal corporation of the State of Oregon; THE CITY OF SEATTLE, WASHINGTON (Seattle), a municipal corporation of the State of Washington; THE CITY OF TACOMA, WASHINGTON (Tacoma), a municipal corporation of the State of Washington; PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON (Grant PUD), a municipal corporation of the State of Washington; PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON (Chelan PUD), a municipal corporation of the State of Washington; PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON

(Pend Oreille PUD), a municipal corporation of the State of Washington; PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON (Douglas PUD), a municipal corporation of the State of Washington; PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY, WASHINGTON (Cowlitz PUD), a municipal corporation of the State of Washington; PUGET SOUND POWER & LIGHT COMPANY (Puget), a corporation; PORTLAND GENERAL ELECTRIC COMPANY (Portland General), a corporation; PACIFIC POWER & LIGHT COMPANY (Pacific), a corporation; THE WASHINGTON WATER POWER COMPANY (Washington Water Power), a corporation; THE MONTANA POWER COMPANY (Montana), a corporation; IDAHO POWER COMPANY (Idaho), a corporation;

W I T N E S S E T H:

WHEREAS the Government and the City of Los Angeles ("the City") are constructing a d-c transmission line with a nominal voltage of 750 kv from the Government's Celilo substation to the City's Sylmar Switching Station, and related terminal facilities, the portion located in Oregon being constructed by the Government and the remaining portion being constructed by the City; and

WHEREAS two 500 kv a-c transmission lines and related facilities from the Government's John Day substation to the Lugo substation near Los Angeles, California, have been constructed by the Government, Portland General, Pacific, and by utilities located in the State of California; and

WHEREAS the 750 kv and 500 kv transmission lines are part of the Pacific Northwest-Pacific Southwest Intertie program as recommended to Congress by the Secretary of the Interior and approved by the Congress by making appropriations for the construction of the Government portion thereof; and

WHEREAS the Pacific Northwest-Pacific Southwest Intertie program contemplates arrangements to provide transmission capacity between the Government's system and utility systems of the Pacific Northwest and the Government's system and the systems of entities in the Pacific Southwest; and

WHEREAS this agreement is one of a series of agreements relating to the use of a part of the Pacific Northwest-Pacific Southwest Intertie, which agreement implements such program; and

WHEREAS the parties hereto from time to time will have Exportable Energy (hereinafter defined) available on their respective systems for sale to California entities; and

WHEREAS capacity available in the Oregon sections of the two 500 kv a-c transmission lines and the 750 kv d-c transmission line ("Transmission Facilities") will be used, among other purposes, to deliver electric energy to or for each of the parties hereto in the manner set forth in this agreement; and

WHEREAS Pacific and Portland General have heretofore entered into agreements with the Administrator designated as Contract No. 14-03-56379 and Contract No. 14-03-55063, respectively, which provide that use of capacity in the Administrator's intertie facilities, pursuant to such agreements, terminate at the time in each calendar year whenever deliveries (hereinafter referred to herein as "Priority

Deliveries''): (1) by Pacific to California entities reach a total of 270,000,000 kilowatt-hours and Pacific has currently a 300,000,000 kilowatt-hour entitlement under the Agreement with Pacific Gas and Electric Company dated September 20, 1967, and (2) by Portland General to California entities reach 1,100,000,000 kilowatt-hours or as such amount is reduced pursuant to Contract No. 14-03-55063; and

WHEREAS the Administrator, Pacific, Portland General, Puget, and Washington Water Power expect to enter into an Agreement (hereinafter designated as Contract No. 14-03-83066 which provides among other things for the priority of use of Excess Energy scheduled over the Transmission Facilities by such parties from Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company; and

WHEREAS the Administrator and the other parties hereto desire to make arrangements for use of capacity in the Transmission Facilities for the disposition of Exportable Energy to California entities; and

WHEREAS the Administrator is authorized pursuant to law to dispose of electric power and energy generated at various federal hydroelectric projects in the Pacific Northwest and to enter into related agreements;

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, the parties agree as follows:

1. **Term of Agreement.** This agreement shall be effective for the term commencing at 12 p.m. on December 31, 1968, and ending twenty (20) years from the date of execution hereof.

2. **Definitions.** As used in this agreement:

(a) "Apportionment" shall mean the amount of Exportable Energy each party hereto is entitled to schedule hereunder for delivery over the Transmission Facilities.

(b) "Coordination Agreement" shall mean the Pacific Northwest Coordination Agreement (designated as Contract No. 14-03-48221) which was executed on August 14, 1964, by the Government and fourteen electric utilities operating in the Pacific Northwest, or any agreement designated by the parties hereto as the successor or replacement of such agreement.

(c) "Critical Period" shall mean the multi-month period determined to be a Critical Period in accordance with the Coordination Agreement.

(d) "Energy Content Curves" shall mean the Energy Content Curves developed in accordance with the Coordination Agreement.

(e) "Exchange Agreement" shall mean each of the contracts to which the Administrator is a party which provide for establishment and maintenance of an Exchange Account by the Administrator in which he will record the exchange energy credits to be made to the Administrator.

(f) "Exportable Energy" shall mean (1) with respect to the Administrator, that portion of the electric energy of the federal Columbia River Power System available for delivery to California entities, excluding the electric

energy delivered to California entities pursuant to the Assignment and Agreements Relating to Canadian Entitlement Exchange Agreement (Contracts No. 14-03-60376, No. 14-03-67588, No. 14-03-67589, and No. 14-03-67590) which would otherwise be wasted because of the lack of a market therefor in the Pacific Northwest at any established rate, and (2) with respect to each of the other parties hereto, that portion of the electric energy generated in the Pacific Northwest by such party or acquired by such party from electric generating plants in the Pacific Northwest which such party determines is excess to its needs and which such party is willing to sell at applicable rates to California entities on a nonfirm basis; *provided, however*, that Exportable Energy as defined in subsection (1) and (2) shall not include such energy which an entity in the Pacific Northwest has made a bona fide offer to purchase at a rate which is not less than the then prevailing rate for comparable nonfirm energy in the Pacific Northwest.

(g) "Heavy Load Hours" shall mean the hours between 8 a.m. and 10 p.m., PST, on Monday through Saturday, excepting national holidays.

(h) "Joint Schedulers" shall mean the group of schedulers presently located in Portland, Oregon, that the parties hereto have appointed and designated to schedule Exportable Energy over the Transmission Facilities.

(i) "Pacific Northwest" shall mean (1) the region consisting of the states of Oregon and Washington, the State of Montana west of the Continental Divide, and such portions of the states of Nevada, Utah, and Wyoming within the Columbia Drainage Basin and of the State of Idaho as the Secretary of the Interior may determine to be within the marketing area of the Federal Columbia River power system, and (2) any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a distribution cooperative which has (A) no generating facilities, and (B) a distribution system from which it serves both within and without said region, (3) with respect to Pacific the area within the State of California served by Pacific, excluding any portion thereof obtained by merger or acquisition after August 14, 1964; *provided* that, with respect to electric energy, peaking capacity, or both, which are subject to the geographical preference of power users in the State of Montana established by the Hungry Horse Dam Act (Act of June 5, 1944, 58 Stat. 270), as amended, the term "Pacific Northwest" shall also include that portion of the State of Montana east of the Continental Divide.

(j) "Peaking Energy" shall mean electric energy accompanying the delivery of capacity.

(k) "Points of Delivery" shall mean one or more of the points of delivery specified in a party's Exchange Agreement excepting

Pacific, whose points of delivery shall be those specified as Main System points of delivery in Contract No. Ibp-7410. In addition Points of Delivery shall include the points of interconnection between the Government and Priest Rapids, Wanapum, Rocky Reach, and Wells power plants if such points are not included as points of delivery under the terms of the Exchange Agreement.

(1) "Surplus Energy" shall mean electric energy generated at federal hydroelectric plants in the Pacific Northwest which would otherwise be wasted because of the lack of a market therefor in the Pacific Northwest at any established rate.

3. Notice of Availability and Market for Exportable Energy.

(a) Each party shall notify the Joint Schedulers by: (1) 10 a.m. of each Thursday of the amount of Exportable Energy it will have available during the following calendar week for disposition to California entities, and (2) 10 a.m. of each day, Monday through Friday, of generating capability available for generation of Exportable Energy for each hour of the following day or days, the amount of Exportable Energy it can supply during each such day or days, and the amount of Exportable Energy which it can supply during Heavy Load Hours of each such day or days. All amounts shall be as of the southern Oregon border. If the Exportable Energy included in a party's notification of weekly amount is not scheduled for delivery to

California entities pursuant to this agreement at the time it could have been made available, and as a result thereof the water required to generate such Exportable Energy is spilled or otherwise becomes unavailable, such party shall promptly notify the Joint Schedulers of the amount by which its Exportable Energy for such week has thereby been reduced. The cumulative daily amounts specified by any party pursuant to subparagraph (2) above for any calendar week shall not be less than the amount specified by such party for such calendar week pursuant to subparagraph (1) above as reduced by any notification given pursuant to the preceding sentence.

(b) Each party agrees that the daily amounts of Exportable Energy given in the notification under subsection (a)(2) above will be consistent with supplying on a reasonable basis the energy forecast as being available for such calendar week pursuant to subsection (a)(1) above.

(c) At any time a party may notify the Joint Schedulers of the availability of Exportable Energy which is in excess of the weekly amounts reported pursuant to subsection (a)(1) of this section.

(d) Each party having a contract for delivery of nonfirm electric energy to a California entity shall notify the Joint Schedulers (1) by 10 a.m. of each Thursday of the portion of its anticipated Apportionment for the following calendar week it expects to schedule pursuant to such contract, and (2) by 4:30 p.m. of each

day Monday through Friday of the amounts requested by such California entity for each hour of the following day or days.

(e) Exportable Energy available from the parties hereto during each hour in the term hereof shall be used to supply requests by California entities for such energy pursuant to their contracts with the Administrator for delivery of Surplus Energy and to supply nonfirm energy to California entities pursuant to such entities' contracts with other parties hereto.

(f) The Administrator, in determining the amount of Surplus Energy he has available for disposition to utilities in California during any calendar week, will take into account the quantity of Exportable Energy the other parties hereto have indicated pursuant to this section on the Thursday preceding such week that they will have available and his estimate of the portion of such Exportable Energy that will be scheduled to the Administrator pursuant to subsections (b) and (c) of section 5.

4. Allocation and Apportionment of Exportable Energy.

(a) The Joint Schedulers shall determine the quantity of Exportable Energy to be allocated for each hour (Hourly Allocation) to all parties hereto pursuant to Exhibit A.

(b) Each party's Apportionment for each hour to be scheduled pursuant to section 5 hereof shall be determined as follows:

- (1) first Pacific and/or Portland General, until the applicable Priority Deliveries by each have been fulfilled, in such amounts as each is entitled to make available for delivery to California entities and to the Administrator pursuant to Contract Nos. 14-03-56379. [sic] and 14-03-55063, respectively;
- (2) next to the Administrator up to the Administrator's Hourly Allocation for such hour;
- (3) last to each of the other parties hereto in an amount determined by multiplying the amount by which the quantity of Exportable Energy to be allocated pursuant to Exhibit A hereof for such hour exceeds the amount to be supplied pursuant to (1) and (2) above by a fraction, the numerator of which is such other party's hourly allocation as determined pursuant to Exhibit A hereof for such hour and the denominator of which is the total of such hourly allocations of all such other parties. A utility whose Priority Deliveries have been fulfilled shall not be included in subsection (1) above but shall be included in this subsection (3) as one of the other parties; if both Pacific and Portland General are included herein, the Administrator shall also be included herein. Each party shall determine its quantity of Exportable Energy available from its system pursuant to this subsection (b)(3) by assuming recession of streamflows at the

maximum historical rate from current levels to those historical levels used in determining the Energy Content Curve, draft of storage to but not below the Energy Content Curve by the end of the Critical Period and current forecasts of loads will be adjusted to reflect the then existing conditions.

- (c) If the requests for Exportable Energy by California entities from the parties hereto is in excess of the total Exportable Energy available in such hour pursuant to subsection (b) above and such Exportable Energy available in such hour is less than the capacity available in the Pacific Northwest-Pacific Southwest intertie lines for transmission of Exportable Energy, and if by using criteria other than that specified in subsection (b)(3) above any party hereto determines it can make available in any hour additional Exportable Energy for delivery during such hour, in excess of its Apportionment, such party's Apportionment shall be increased for such hour by the amount determined by allocating to the extent of any deficiency of Exportable Energy as determined in subsection (b) above such additional Exportable Energy in the same manner as designated in Exhibit A hereof, attached hereto. Notice of such additional Exportable Energy shall conform to the provisions of section 3 hereof.
- (d) During any hour that the Administrator is delivering Peaking Energy in excess of Surplus Energy pursuant to his contracts with

California entities the Administrator, to the extent of any deficiency of Surplus Energy during such hour, may, but is not obligated to, request additional deliveries of Exportable Energy from the other parties hereto during other hours that Exportable Energy is available as determined pursuant to Exhibit A hereof.

5. Scheduling of Exportable Energy.

(a) All schedules of Exportable Energy shall be made through or with the knowledge of the Joint Schedulers. No party shall schedule during any hour Exportable Energy pursuant to this agreement and for sale to California entities under any other contract a total quantity in excess of such party's Apportionment for such hour; *provided, however*, that the amounts scheduled to a party hereto pursuant to subsections (b) and (c) below shall not be deemed to be a part of such party's Apportionment pursuant to this subsection.

(b) During any hour that the Administrator is scheduling Surplus Energy to California entities the Joint Schedulers shall determine the amounts of Exportable Energy to be scheduled to the Administrator during such hour from each of the parties hereto in the amount determined by subtracting amounts scheduled by such party directly to California entities pursuant to subsection (c) below from such party's Apportionment for such hour. In addition the Joint Schedulers shall schedule for any hour any amounts of Exportable Energy requested for delivery by the Admin-

istrator pursuant to section 4(d) hereof which another party hereto has agreed to deliver. Each of such parties shall make Exportable Energy so scheduled available to the Administrator at one or more of such party's Points of Delivery, or at the southern Oregon border pursuant to section 6 hereof. Exportable Energy scheduled by a party to the Administrator pursuant to this subsection shall be created to such party in its Exchange Account pursuant to subsection (d) below.

(c) A party hereto may schedule, in any hour, all or a portion of its Apportionment for transmission to the southern Oregon border and direct delivery to the California entity. Exportable Energy so scheduled shall be made available (1) to the Administrator at one or more of such party's Points of Delivery, and/or (2) pursuant to section 6 hereof to another party hereto as mutually agreed by such parties.

(d) Each party shall be credited in its Exchange Account with the amount of energy determined by multiplying the amount of energy scheduled by such party pursuant to subsection (b) above by a factor of 0.8. Such factor is computed by dividing 2 mills, the rate specified in Bonneville Wholesale Power Rate Schedule S-1, by 2.5 mills, the rate specified in Bonneville Wholesale Energy Rate Schedule H-4. If another rate is substituted in either or both of such rate schedules the factor 0.8 specified above shall thereafter be replaced with a new factor

computed by using the substituted rate or rates as appropriate.

(e) Payment for Exportable Energy scheduled by a party hereto for direct deliveries to California entities pursuant to subsection (c) above shall be arranged by such party and entities prior to such schedules.

(f) In addition to Exportable Energy scheduled pursuant to this section each party shall schedule each hour losses to the transmitting party in the amount determined by multiplying the amount of Exportable Energy so scheduled for such hour by the loss factor specified for such party in Exhibit B attached hereto, and hereby made a part hereof.

6. **Transmission of Exportable Energy.** A party hereto on mutual agreement with another party hereto other than the Administrator may designate such other party to transmit all or a portion of its Apportionment of Exportable Energy to the southern Oregon border during any hour.

7. **Credit for Use of Facilities.**

(a) The Administrator shall credit to his account in the Exchange Account of each of the parties the product obtained by multiplying the number of kilowatt-hours scheduled to the Administrator from such party pursuant to sections 5(b), 5(c)(1), and 5(f) hereof by the transmission factor specified for such party in Exhibit B attached hereto. The transmission factor or charge shall be subject to equitable adjustment by the Administrator by not more often than once every five (5) years. If such factor or charge is adjusted a

new Exhibit B shall be substituted for the existing Exhibit B to reflect such adjustment.

(b) A party scheduling Exportable Energy to a party other than the Administrator for delivery to the southern Oregon border pursuant to section 5(b), 5(c)(2), and 5(f) hereof shall pay the transmitting party each month the amount determined by multiplying the number of kilowatt-hours of electric energy so scheduled pursuant to said sections 5(b), 5(c)(2), and 5(f) during such month by the applicable rate specified for such transmission in Exhibit B. The rate per kilowatt-hour specified in said Exhibit B shall be proportionately adjusted at the time the Administrator's transmission factors are adjusted pursuant to subsection (a) above.

8. Excess Energy Available from California Entities.

(a) Except as provided in said Contract No. 14-03-83066 the parties hereto agree that Excess Energy available at any time from California entities which is insufficient to serve all the amounts reasonably requested by entities in the Pacific Northwest shall be prorated among such Pacific Northwest entities in accordance with such requests.

(b) Schedules of Excess Energy from the California entities shall be made through or with the knowledge of the Joint Schedulers. Payment or credit for transmission of such Excess Energy shall be as provided for Exportable Energy pursuant to section 7 hereof. Losses will be determined and scheduled pursuant to section 5(f) hereof

excepting during periods when the scheduled flow of such Excess Energy is in the opposite direction to the actual flow of energy in the Transmission Facilities when losses shall be deemed to be zero.

9. **Additional Parties.** Any entity in the Pacific Northwest now or hereafter having an Exchange Agreement with the Administrator may become a party hereto by executing and delivering to all of the other parties a written Addendum binding itself to all of the covenants, terms and conditions of this agreement. Such joinder shall be effective upon the date specified in such Addendum or the date upon which all of the parties hereto have received an executed copy of such Addendum, whichever is later.

10. **Adjustment for Change of Conditions.** If changes in conditions occur which substantially affect any loss factor or meter compensation, the item affected will be changed in a manner which will conform to such changes in conditions.

11. **Assignment of Agreement.** This agreement shall inure to the benefit of, and shall be binding upon the respective successors and assigns of the parties to this agreement; *provided, however*, that neither this agreement nor any interest therein shall be transferred or assigned by any party to any party other than the United States or an agency thereof without the written consent of the other parties.

12. **Waiver of Default.** Any waiver at any time by any party to this agreement of its rights with respect to any default of any other party thereto, or with respect to any other matter arising in connection with this agreement, shall not be considered a waiver with respect to any subsequent default or matter.

13. Provisions Required by Statute or Executive Order. The provisions required to be inserted by statute or executive order are attached hereto as Exhibit C and are hereby made a part of this agreement. The parties hereto other than the Administrator shall individually be "the Contractor" mentioned in said Exhibit C.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in several counterparts.

UNITED STATES OF AMERICA
Department of the Interior

(SEAL) By S/ H. R. RICHMOND

Bonneville Power Administrator

THE CITY OF EUGENE, OREGON
By and Through Eugene Water
& Electric Board

(SEAL) By S/ J. A. TIFFANY

President of the Board

ATTEST:

S/ BYRON PRICE

General Manager-Secretary

—M19—

THE CITY OF SEATTLE,
WASHINGTON

(SEAL) By S/ WES UHLMAN

Mayor

ATTEST:

S/ C. G. ERLANDSON

City Comptroller and City Clerk

THE CITY OF TACOMA,
WASHINGTON

(SEAL) By S/ GORDON N. JOHNSTON

Mayor

ATTEST:

S/ H. R. BOND

City Clerk

PUBLIC UTILITY DISTRICT NO. 2
OF GRANT COUNTY,
WASHINGTON

(SEAL) By S/ R. W. GILLETTE

Manager

ATTEST:

S/ ERIC D. PETERSON

Secretary

PUBLIC UTILITY DISTRICT NO. 1
OF CHELAN COUNTY,
WASHINGTON

(SEAL)

By S/ ROBERT O. KEISER

President

ATTEST:

S/ KIRBEY BILLINGSLEY

Secretary

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY,
WASHINGTON

(SEAL)

By S/ LLOYD A. CROWN

President

ATTEST:

S/ GLENN EARL

City Clerk

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY,
WASHINGTON

(SEAL)

By S/ HOWARD PREY

President

S/ LLOYD McLEAN

Vice President

ATTEST:

S/ MICHAEL DONEEN

Secretary

PUBLIC UTILITY DISTRICT NO. 1
OF COWLITZ COUNTY,
WASHINGTON

(SEAL)

By S/ LACY M. PEOPLES

President

ATTEST:

S/ FORREST W. BERRY

Secretary

PUGET SOUND POWER
& LIGHT COMPANY

(SEAL) By S/ D. H. KNIGHT

Vice President

ATTEST:

S/ W. E. WATSON

Secretary

PORTLAND GENERAL
ELECTRIC COMPANY

(SEAL) By S/ A. J. PORTER

Vice President

ATTEST:

S/ H. H. PHILLIPS

PACIFIC POWER
& LIGHT COMPANY

(SEAL) By S/ R. B. LISBAKKEN

Vice President

ATTEST:

S/ T. L. SELLIKEN

Assistant Secretary

THE WASHINGTON WATER
POWER COMPANY

(SEAL) By S/ M. F. HATCH

Vice President

ATTEST:

S/ R. L. STRENGE

Assistant Secretary

THE MONTANA POWER
COMPANY

(SEAL) By S/ J. A. McELWAIN

Executive Vice President

ATTEST:

S/ JOHN C. HAUCK

Secretary

IDAHO POWER COMPANY

(SEAL) By S/ GLENN J. HALL

Vice President

ATTEST:

S/ JAMES E. BRUCE

Secretary

Certificate

I, Donald W. Franzwa, Head of Contracts, Branch of Customer Service, Division of Power Management, Bonneville Power Administration, do hereby certify that the within and foregoing is a true, complete and conformed composite copy of Contract No. 14-03-73155 and that signed counterpart originals are on file with the Bonneville Power Administration, each signed by one or more of the parties thereto which taken together bear the signatures of all the parties thereto.

Date August 4, 1972 S/ DONALD W. FRANZWA

EXHIBIT A

**Procedure for the Allocation
of Exportable Energy**

Step-wise procedure for allocating Exportable Energy among Pacific Northwest suppliers.

1. Daily determination of Southwest Exportable Energy needs. From requests submitted by Southwest entities pursuant to agreements between parties hereto and such entities and submitted to the Joint Schedulers pursuant to section 3(d) of this agreement the Joint Schedulers shall:

a. Tabulate the amounts of Exportable Energy desired for each hour of such day limiting such amount for each hour to the amount of capacity in the Transmission Facilities available to transmit Exportable Energy.

b. Compute the amount of Exportable Energy desired during Heavy Load Hours of such day limiting such amounts for each hour to the amount of capacity in the Transmission Facilities available for transmitting Exportable Energy.

c. Compute the total amount of Exportable Energy desired by Southwest utilities for such day which can be transmitted over available capacity in the Transmission Facilities.

2. Daily determination of amount of Exportable Energy available from each party. Each party shall submit to the Joint Schedulers pursuant to section 3(a)(2) of this agreement each day:

a. Its hourly generating capability for Exportable Energy during each hour of such day.

b. Total amount of Exportable Energy which the party can supply during the Heavy Load Hours for such day.

c. Total amount of Exportable Energy which the party can supply during such day.

3. Verification of Exportable Energy submissions of the parties.

Joint Schedulers shall verify that:

a. The hourly capabilities specified in Step 2a can produce the amount of Exportable Energy during Heavy Load Hours determined in Step 2b.

b. The hourly capabilities specified in Step 2a can produce the amount of Exportable Energy determined in Step 2c.

c. If either sum does not check make appropriate reduction in such party's available energy pursuant to Steps 2b and 2c.

4. Daily Summation of Exportable Energy.

The Joint Schedulers shall tabulate the amounts of Exportable Energy available from the parties as follows:

a. Hourly capabilities.

b. Heavy Load energy.

c. 24-hour energy.

5. Daily Allocation of Heavy Load Hour Exportable Energy.

a. Compute the ratio of desired amount Heavy Load Hour Exportable Energy (Step

1b) to the amount of Heavy Load Hour Exportable Energy available tabulated in Step 4b.

b. Determine each party's Heavy Load Hour allocation of Exportable Energy by multiplying the ratio determined in subsection a above times each party's Heavy Load Hour Exportable Energy as determined pursuant to Steps 2b and 3.

c. Distribute each party's Heavy Load Hour allocation determined pursuant to Step 5b by hours in the same shape as the desired Southwest export pursuant to Step 1b.

d. Compare each party's hourly allocation pursuant to Step 5c above against the party's hourly capabilities determined pursuant to Steps 2a and 3. If any hourly allocations to such party exceed its correspondingly hourly capability, reduce such party's allocation to its hourly capability.

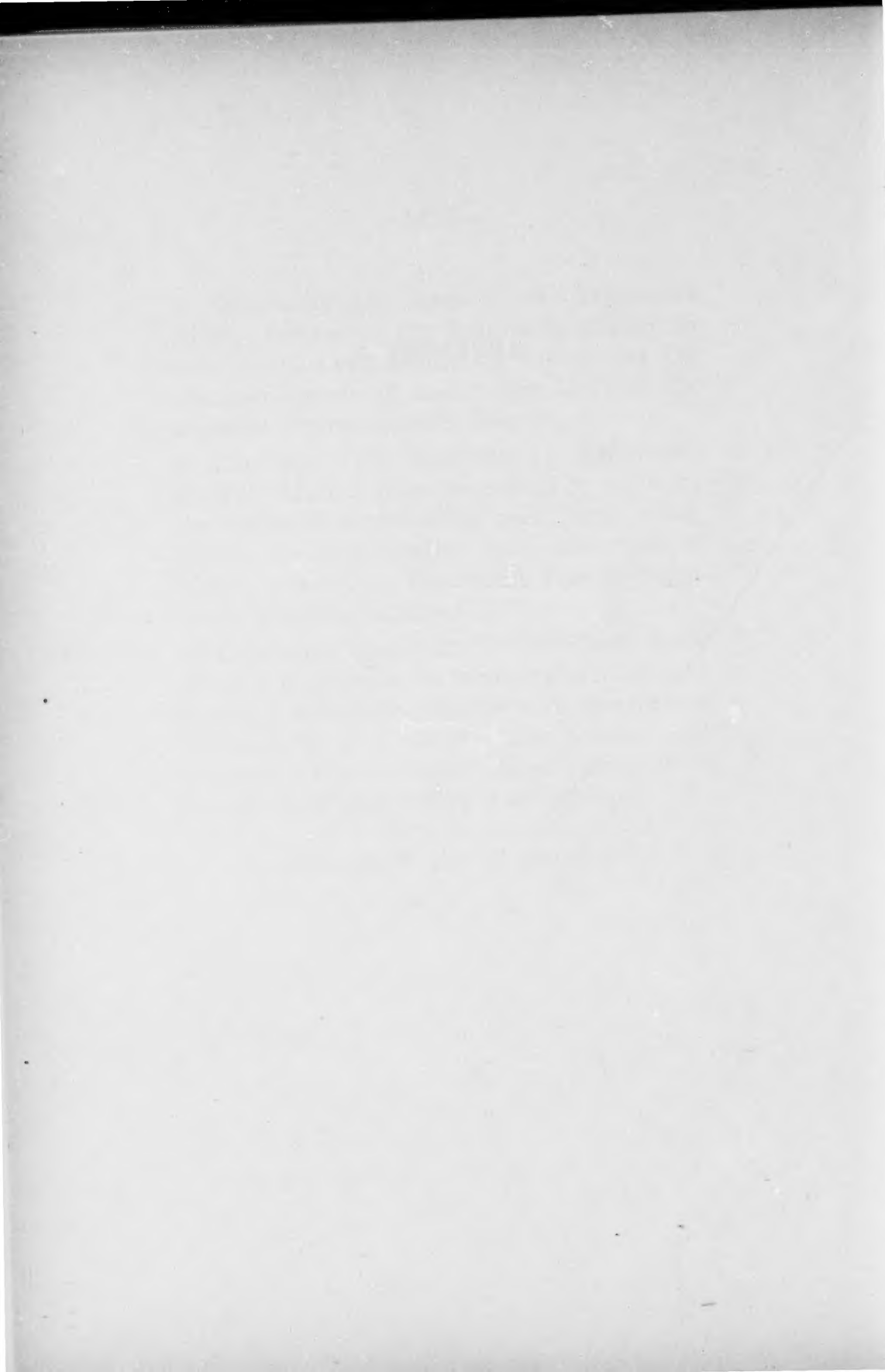
e. If any reductions have been made for any hour or hours pursuant to Step 5d, compute the Heavy Load Hour Exportable Energy and hourly capability for each party which has not already been allocated pursuant to this section and repeat the calculations under this section for the hours that a reduction was necessary pursuant to Step 5d above until the desired and allocated energy for Heavy Load Hours are the same.

5. Allocation of Exportable Energy for non-Heavy Load Hours.

- a. Determine the amount of Exportable Energy desired by the Southwest utilities for non-Heavy Load Hours by subtracting the amounts computed under Step 1b from the amounts combined under Step 1c.
- b. Determine the amounts of Exportable Energy available from the parties by reducing the amounts specified by each party under Step 2c by such parties' total allocation of Heavy Load Hour Exportable Energy determined pursuant to Step 5.
- c. Determine each party's non-Heavy Load Hour allocation in the same manner as used in Step 5 substituting the amounts determined in Steps 6a and 6b for the desired and available Heavy Load Hour Exportable Energy sums used in Step 5 calculations.

[Exhibits B and C omitted]

APPENDIX N



APPENDIX N

Department of Energy
Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208

In reply refer to: PK

Aug 20 1984

Mr. Gerald L. Copp, Chelan County PUD
No. 1, Wenatchee, WA 98801
Mr. Robert L. McKinney, Cowlitz County PUD,
Longview, WA 98632
Mr. Fred W. Lieberg, Douglas County PUD
No. 1, East Wenatchee, WA 98801
Mr. Keith Parks, Eugene Water & Electric
Board, Eugene, OR 97440
Mr. John L. McMahan, Grant County PUD
No 2, Ephrata, WA 98823
Mr. Donald E. Barclay, Idaho Power Company,
Boise, ID 83707
Mr. W. Paul Schmechel, The Montana Power
Company, Butte, MT 59701
Mr. James Pienovi, Pacific Power & Light
Company, Portland, OR 97204
Mr. Jim McCampbell, Pend Oreille County PUD
No. 1, Newport, WA 99156
Mr. Glen E. Bredemeier, Portland General
Electric, Portland, OR 97204
Mr. David H. Knight, Puget Sound Power and
Light Company, Bellevue, WA 98009

—N2—

Mr. John Saven, Seattle City Light,
Seattle, WA 98104

Mr. Paul Nolan, City of Tacoma,
Tacoma, WA 98411

Mr. Harold W. Harding, The Washington Water
Power Co., Spokane, WA 99220

Gentlemen:

The Bonneville Power Administration (BPA) has implemented the Exportable Agreement (BPA Contract No. 14-03-73155) to provide an hourly allocation of Federal and non-Federal Exportable Energy over the Southern Intertie. The Agreement does not specify which of BPA's established rates will be used as the applicable rate for Exportable Energy.

Beginning at 2400 hours on Monday, August 27, 1984, BPA intends to implement the Exportable Agreement allocation procedures using the Standard Rate as the applicable rate under such agreement. Of course, BPA retains the discretion to use any Nonfirm Energy Rate if BPA determines such use would likely result in increased revenues to BPA.

Sincerely,

Original Signed by
JAMES L. JONES
Assistant Administrator for
Power and Resources Management

③ ②
Nos. 87-1835 and 87-1836

Supreme Court, U.S.

FILED

AUG 3 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

CALIFORNIA ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION, PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

CALIFORNIA PUBLIC UTILITIES COMMISSION, PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Near Term Intertie Access Policy (NTIAP) adopted by the Bonneville Power Administration (BPA), which does not impose any charges for BPA power or for transmission of nonfederal power, is nevertheless a "rate[] or rate schedule[]" within the meaning of 16 U.S.C. 839e(k).

2. Whether the NTIAP's distinctions between Northwest utilities and extraregional utilities comply with BPA's statutory obligations to "ma[k]e available" excess capacity on the Pacific Northwest-Pacific Southwest Intertie "as a carrier for transmission of other electric energy" (16 U.S.C. 837e), and to "make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which [the Administrator of BPA] determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States" (16 U.S.C. 838d).

3. Whether the NTIAP is invalid on the ground that it does not promote competition to the maximum extent possible.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1835

CALIFORNIA ENERGY RESOURCES CONSERVATION AND
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v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

No. 87-1836

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v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 831 F.2d 1467.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1987. A petition for rehearing was denied on February 4, 1988 (Pet. App. C1-C2). The petitions for a writ of certiorari were filed on May 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bonneville Power Administration (BPA) is an independent, self-financed power marketing agency within the United States Department of Energy. BPA's operations are governed by the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839-839h; the Bonneville Project Act of 1937, 16 U.S.C. 832-832j; the Pacific Northwest-Pacific Southwest Regional Preference Act (Regional Preference Act), 16 U.S.C. (& Supp. IV) 837-837h; and the Federal Columbia River Transmission System Act (Transmission System Act), 16 U.S.C. 838-838k.

In addition to marketing hydroelectric power generated by 31 federal dams in the Pacific Northwest, BPA operates a system of electric power transmission lines within the Pacific Northwest.¹ BPA transmits both federal and nonfederal firm power (*i.e.*, power that is assured to be continuously available) and nonfirm power (*i.e.*, power that is available only when supply exceeds firm power commitments) on its transmission lines. Nonfederal power is transmitted over capacity not required for BPA's own use.

Among BPA's transmission lines is a large portion of the Pacific Northwest-Pacific Southwest Intertie, a congressionally authorized system of transmission lines that allows the Pacific Northwest and Pacific Southwest to exchange power when one region has a surplus and the other has heavy demand (16 U.S.C. 838-838k). BPA owns and operates most of the Intertie lines north of the Oregon-

¹ The Pacific Northwest is defined by statute (16 U.S.C. 837(b)) as (1) Oregon, Washington, Idaho, and Montana east of the continental divide; (2) parts of Nevada, Utah, and Wyoming that are within the Columbia River drainage basin; and (3) contiguous areas within 75 miles of the above.

California border, and California utilities own the lines south of Oregon (Pet. App. A4). The lines were approved by Congress primarily to improve BPA's ability to meet its obligation to repay the United States Treasury for loans made to BPA in order to construct Northwest hydroelectric facilities (*id.* at B18, E93-E94). BPA is currently obligated to repay the Treasury on a timely basis more than \$8 billion of federal investments in the Federal Columbia River Power System. BPA has more than a contractual obligation to repay those investments: Congress has made repayment one of BPA's statutory duties (see 16 U.S.C. 832f, 838g(3), 839e(a)(1)).

2. In 1969, very shortly after the Intertie became operational, BPA entered into a contract with several Northwest utilities known as the "Exportable Agreement" (Pet. App. M1-M28). The Exportable Agreement takes effect under certain conditions in which Northwest utilities have more power available to sell than the available Intertie capacity. It allocates the capacity of the Intertie pro rata among BPA and the Northwest utility signatories. Others, such as Canadian utilities, are not allowed access to the Intertie under the Exportable Agreement. No one has ever before challenged the Exportable Agreement on the ground that its pro rata allocation mechanism unlawfully restricts competition among Northwest utilities or that BPA has a statutory obligation to allow Canadian sellers access to the Intertie.

For most of the life of the Intertie, BPA has allowed access to the Intertie on a first-come, first-served basis when the Exportable Agreement has not been in effect. Although petitioner California Energy Resources Conservation and Development Commission (CEC) maintains that this generous access policy represented BPA's view of its statutory obligations (CEC Pet. 7), CEC cites nothing

whatsoever to support that contention, and BPA has never expressed the view that CEC attributes to it. To the contrary, BPA granted access on a first-come, first-served basis not because it believed it had any statutory obligation to do so but because BPA's ability to meet its Treasury payment obligation had not yet been put in jeopardy by various power supply and other factors. See generally Pet. App. D7-D8, E4-E5, E88-E100.

Conditions had changed dramatically by the early 1980s. The Northwest suffered an economic recession in the midst of sharply rising electric power rates, thus decreasing the amount of energy that BPA (and others) could sell in the Northwest. Combined with higher than average water years and surplus generating resources, these conditions created a large surplus of power in the Northwest, and on BPA's system in particular. The existence of a power surplus created competing demands for BPA's Intertie capacity among Northwest suppliers. In addition, BPA in particular experienced serious revenue shortfalls when its direct service aluminum industrial customers, the source of one-third of its power revenues, initiated significant cutbacks in response to world aluminum prices. Some plants were shut down. Pet. App. B9-B10.

In addition to the Northwest power surplus, other factors necessitated action by BPA. Unlike the northern portion of the Intertie, which is predominantly under federal control, the southern portion of the Intertie (within California) is controlled almost exclusively by three huge California utilities and the City of Los Angeles. These companies comprise an entity called the California Power Pool, which maintains tight control over access to the southern portion of the Intertie through a complicated contract called the Pacific Intertie Agreement. Through

that agreement, the utilities have prevented other utilities in California and the Southwest from gaining access to the Intertie and have agreed not to share excess Intertie capacity among themselves. These practices limit competition for Northwest power and depress prices for Northwest suppliers. See *Pacific Gas & Elec. Co.*, 26 F.E.R.C. ¶ 63,048 (1984); Pet. App. A18-A20, E51, E67-E69, E73-E74, E76-E77, E82, H11-H13.

In light of all of these circumstances, BPA's ability to comply with its statutory obligation to repay the Treasury for federal expenditures was in jeopardy. BPA thus determined in the early 1980s that it had become necessary to promulgate formal policies governing access to the Intertie.

3. To allocate the limited transmission capacity of the federal portion of the Intertie among utilities, BPA has adopted Intertie access policies on three occasions. On September 7, 1984, BPA promulgated an interim Near Term Intertie Access Policy (NTIAP). See 49 Fed. Reg. 44232 (Pet. App. D1-D33). The Los Angeles Department of Water and Power challenged that policy in the Ninth Circuit, contending that its adoption was an abuse of discretion and beyond BPA's statutory authority. In 1985, the court of appeals rejected those contentions and upheld the interim NTIAP. See *Department of Water & Power of the City of Los Angeles v. Bonneville Power Administration*, 759 F.2d 684 (9th Cir. 1985) (*LADWP*) (Pet. App. B1-B26).

Also in 1985, the California Public Utilities Commission (CPUC), along with several California investor-owned utilities, filed a petition with the Federal Energy Regulatory Commission (FERC), contending that BPA's adoption of the interim NTIAP was a rate action requiring ratemaking proceedings and approval by FERC. Both ini-

tially and in response to requests for rehearing, FERC held that the NTIAP was not a rate, and it denied the petition. See *Public Utilities Comm'n of California v. United States Dep't of Energy*, 33 F.E.R.C. ¶ 61,235 (1985), reh'g denied, 39 F.E.R.C. ¶ 61,088 (1987).

On June 1, 1985, BPA adopted a revised NTIAP, which was substantially identical to the interim NTIAP (see Pet. App. A6). 50 Fed. Reg. 26827 (Pet. App. G1-G31). That policy, along with the interim NTIAP, was challenged in the Ninth Circuit by petitioners in this case. The court of appeals upheld the revised NTIAP as well (*id.* at A1-A27).

On May 17, 1988, BPA finalized its Long-Term Intertie Access Policy (LTIAP).² The final LTIAP has superseded the interim and revised NTIAPs.³

3. The interim and revised NTIAPs are the subject of these petitions. Under the NTIAP, firm transmission was provided for firm power sales between Pacific Northwest utilities and California purchasers. This was a new service provided by BPA to nonfederal utilities. Assured service for transmission of firm power generated by utilities outside the Pacific Northwest (extraregional utilities), including Canadian utilities, was not available. Pet. App. G10, G21.

² We are lodging with the Clerk a copy of the LTIAP, with attached Executive Summary [hereinafter LTIAP Executive Summary], and a copy of the accompanying Administrator's Decision [hereinafter LTIAP Administrator's Decision].

³ One aspect of the LTIAP has not yet taken effect. Section 5(d) of the LTIAP provides for an 18-month experiment in which, under certain conditions, no specific utility other than BPA will be given a pro rata allocation of the Intertie capacity, but rather Northwest utilities (and, in certain circumstances, other utilities) will compete among themselves to arrange transactions using the Intertie. That experiment requires considerable advance planning (see LTIAP Administrator's Decision 66-69; LTIAP Executive Summary 7-9) and has not yet begun.

The NTIAP established three different allocation scenarios for the transmission of nonfirm power. Under Condition 1—generally when streamflows throughout the Northwest are so high that water not used for hydroelectric generation will spill over the dams and thus be wasted—Intertie capacity was allocated according to the terms of the Exportable Agreement, *i.e.*, on a pro rata basis among BPA and Northwest generating utilities for transmission of surplus nonfirm energy to California. Pet. App. G21. The allocation was made on the basis of daily and hourly declarations of available surplus power that Northwest utilities are willing to sell at BPA's applicable rate. This was because, under the Exportable Agreement, the utilities generally sell their allocations to BPA, which then markets it at the federal rate to California utilities as federal surplus.

Condition 2 denominated the situation in which BPA and Northwest utilities had enough surplus nonfirm energy to fill BPA's Intertie capacity, but only if higher priced surplus was included in the declarations. Intertie access was divided among BPA and Northwest utilities on a pro rata basis. Each utility made its own sales arrangements with California buyers. Under Condition 2, extraregional utilities had no access to the Intertie. Canadian utilities could obtain access, however, if they agreed to greater coordination of their hydrosystem with that of the Pacific Northwest or agreed to provide other appropriate consideration. Pet. App. G20, G21.

Under Condition 3, when BPA and Northwest utilities did not have enough surplus nonfirm energy to fill Intertie capacity, the available Intertie capacity was allocated first to meet their needs. Thereafter, extraregional utilities including Canadian utilities had access to remaining Intertie capacity (Pet. App. G21).

4. Petitioners brought these suits, pursuant to 16 U.S.C. 839f(e)(5), in the United States Court of Appeals for the Ninth Circuit. Petitioners contended that the NTIAP constituted ratemaking and was thus subject to FERC review and approval (Pet. App. A7). Petitioners further contended that the NTIAP was not factually justified and was therefore arbitrary, capricious, and an abuse of discretion (*id.* at A13). Also, petitioners contended that the NTIAP discriminated against extraregional utilities in violation of 16 U.S.C. 837e and 838d (Pet. App. A14). In addition, petitioners contended that the NTIAP failed to conform to the maximum extent possible to federal anti-trust laws and policies (*id.* at A15). Finally, petitioners contended that the NTIAP discriminated against new generating sources in violation of 16 U.S.C. 837e and 839f(d) (Pet. App. A20).

5. The court of appeals rejected each of petitioners' claims. The court of appeals held that the NTIAP did not constitute ratemaking because it did not establish or change the charges assessed by BPA for sales of its power or transmission services (Pet. App. A10-A11). As the court of appeals recognized, the NTIAP "at most" affected nonfederal power prices, and FERC review is required only for BPA's rates for federal power sales and transmission of nonfederal power (*ibid.*).

With regard to petitioners' claim that the NTIAP was not factually justified, the court of appeals recalled its previous holding in *LADWP* that the interim NTIAP was designed by BPA to mitigate projected revenue shortfalls and allow it to meet its Treasury payments and, thus, " 'the policy is not only statutorily authorized but statutorily mandated' " (Pet. App. A14 (quoting *id.* at B20)). Noting that petitioners had conceded that the interim NTIAP was identical to the revised NTIAP and had

pointed to nothing in the record of the revised NTIAP that would require reexamination of the justification identified in *LADWP*, the court of appeals held that it was bound by its earlier determination in *LADWP* that the interim NTIAP was factually justified (*id.* at A14).

Similarly, the court of appeals held that its previous determination in *LADWP* that “ ‘BPA is required to allocate use of federally-owned transmission facilities in a manner which accords preference first to transmission of federal power and then to transmission of other Northwest-generated power’ ” foreclosed petitioners’ claim that the NTIAP unlawfully discriminated against extraregional utilities (Pet. App. A14-A15 (quoting *id.* at B25)).

In rejecting petitioner’s antitrust claims, the court of appeals held that, though BPA is exempt from the antitrust laws, it is obligated “to consider the interests of preserving competition” (Pet. App. A15-A16). The court stated, however, that this obligation does not override BPA’s statutory obligation to be fiscally self-supporting (*id.* at A16). Further, the court noted that petitioners’ proposal for allocation of Intertie capacity under Conditions 1 and 2 was not raised in the administrative proceedings leading to the NTIAP, and therefore BPA had not had an opportunity to consider petitioners’ alternative (*id.* at A17).⁴ The court observed, however, that BPA had evaluated two other alternatives closely related to petitioners’ alternative (*id.* at A17-A18). Reviewing the administrative record, the court of appeals held that BPA had reasonably balanced antitrust concerns with its other statutory obligations (*id.* at A17-A20).⁵

⁴ Petitioners’ proposal is being tested in the LTIAP. See note 6, *infra*.

⁵ Finally, the court of appeals rejected petitioners’ claim that the NTIAP unlawfully discriminated against new generating sources,

ARGUMENT

1. We discuss below the reasons why petitioners' challenges to the decision of the court of appeals are without merit. We note first, however, that there are reasons apart from the merits why this Court should not review that decision.

First, there is a conceded "absence of a conflict in the circuits" (CEC Pet. 18). Although the exclusive jurisdiction granted to the Ninth Circuit by 16 U.S.C. 839f(e)(5) makes this an area of the law in which such conflicts inherently do not develop, that does not by itself make the absence of any such conflict "irrelevant" (*ibid.*). Rather, it means that petitioners must shoulder the burden of showing some other reason why this case is so important, and the decision below of such dubious correctness, that review by this Court is warranted. We submit that they have not met that burden.

Second, the access policies that petitioners challenge were superseded by the LTIAP on May 17, 1988, and any challenge to those policies is, in most respects, now moot.⁶

holding that in this respect BPA had reasonably acted to fulfill its statutory obligation to protect fish and wildlife in the Columbia River basin (Pet. App. A21-A23). The court of appeals also noted that the exclusion was only temporary, as BPA would be considering the issue anew in developing the LTIAP (*id.* at A25). Petitioners have not asked this Court to review this issue.

⁶ The NTIAP's pro rata allocation under Conditions 2 and 3 remains temporarily in effect while BPA and affected utilities work out the details of implementation of Section 5(d) of the LTIAP, which (as an experiment) will accept petitioners' proposal to let market forces rather than pro rata allocations determine nonfederal Northwest (and, under Condition 3, Canadian) utilities' access to the Intertie. See generally LTIAP Administrator's Decision 48-71. Thus, although petitioners' challenge to the NTIAP is not yet moot in this respect, it soon will be, and a grant of certiorari to review an aspect of the

Although the LTIAP does retain some of the features that petitioners find objectionable, the proper course is for them to raise whatever objections they still have in a new proceeding in the Ninth Circuit, not to seek an advisory opinion from this Court on the validity of a now-superseded policy as a means to attack the policy that is now in effect.⁷

For these prudential reasons, the Court should deny certiorari. As we now show, the decision below also is correct.

2. a. Petitioner CPUC, but not petitioner CEC, argues that the NTIAP is a "rate[] or rate schedule[]" within the meaning of 16 U.S.C. 839e(k) and that BPA therefore could not implement it without first obtaining approval from FERC (CPUC Pet. 8-11). CPUC argues that the amount of money that California ratepayers expend for energy will be affected by the NTIAP and infers from that argument that FERC approval is required. Noticeably lacking from CPUC's discussion, however, is any statutory language, legislative history, or relevant case law to support CPUC's contention.⁸

NTIAP that has been very significantly altered in the LTIAP would be most inappropriate. Additionally, the LTIAP maintains the distinction between Northwest utilities and extraregional utilities, although it will treat Canadian utilities equally with U.S. extraregional utilities if the United States-Canadian Free Trade Agreement is ratified by both countries.

⁷ On July 19, 1988, CEC in fact filed a petition for review of the LTIAP in the Ninth Circuit.

⁸ CPUC cites several Ninth Circuit cases, but the court below had no difficulty distinguishing those same cases (Pet. App. A7-A13). In any event, if there were an intracircuit conflict between the cases that CPUC cites and the decision below, it would be one for the Ninth Circuit, not this Court, to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

CPUC's claim that the NTIAP constituted ratemaking has had multiple reviews, twice by FERC, the administrative body charged with review of BPA's ratemaking actions, and once by the court of appeals (Pet. App. A7-A13; *Public Utilities Comm'n of California v. United States Dep't of Energy*, 33 F.E.R.C. ¶ 61,235 (1985), reh'g denied, 39 F.E.R.C. ¶ 61,088 (1987)). On all occasions, the conclusion was that the adoption of the NTIAP did not constitute ratemaking. As the court of appeals recognized, the adoption of the NTIAP did not impose any charges for power, define any formula for computing charges, or authorize BPA to alter its own charges for power and, consequently, was not ratemaking (Pet. App. A10-A13). Similarly, FERC concluded that "[o]ther BPA actions, although they may arguably have an impact on the revenues that BPA receives from sales of power and energy, are beyond the scope of the Commission's authority over BPA" (33 F.E.R.C. at 61,489). CPUC's claim here, that neither the court of appeals nor FERC itself understood the scope of FERC's jurisdiction, is without basis.

b. Both petitioners contend that BPA has a statutory obligation to grant Canadian generating utilities access to the Intertie on the same terms as Northwest utilities; and that BPA has a statutory obligation to require generating utilities that wish to make sales to California to compete for Intertie access, so that BPA may not instead make pro rata allocations of Intertie capacity to such utilities under any conditions (CPUC Pet. 11-13; CEC Pet. 18-23). The statutory provisions alleged to create those immutable duties are 16 U.S.C. 837e, enacted in 1964, which requires BPA to "ma[k]e available" excess Intertie capacity "as a carrier for transmission of other electric energy," and 16 U.S.C. 838d, enacted in 1974, which requires BPA to

“make available to all utilities on a fair and nondiscriminatory basis, any capacity in the federal transmission system which [the Administrator of BPA] determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.”

Petitioners’ reading of these statutes should prevail, of course, only if BPA’s contrary view is an unreasonable one; to the extent that a statute can reasonably be construed in more than one way this Court’s consistent practice is to defer to the interpretation adopted by the agency charged with administering the statute. See, e.g., *Aluminum Co. of America v. Central Lincoln Peoples’ Utils. Dist.*, 467 U.S. 380, 389-390 (1984) (deference to interpretation of Northwest Power Act by Administrator of BPA); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865 (1984) (deference to administrative interpretation because multiple public and private interests were involved in developing the proposed legislation but were not addressed in detail by the legislation); *K mart Corp. v. Cartier, Inc.*, No. 86-495 (May 31, 1988), slip op. 8; *EEOC v. Commercial Office Prods. Co.*, No. 86-1696 (May 16, 1988), slip op. 7; *Lukhard v. Reed*, No. 85-1358 (Apr. 22, 1987), slip op. 1 (Blackmun, J., concurring in the judgment) (“In a statutory area as complicated as this one, the administrative authorities are far more able than this Court to determine congressional intent in the light of experience in the field.”); *United States v. City of Fulton*, 475 U.S. 657, 667 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Connecticut Dep’t of Income Maintenance v. Heckler*, 471 U.S. 524, 532 & n.21 (1985).⁹

⁹ BPA’s construction of its statutory authority, as upheld by the Ninth Circuit in *LADWP* and subsequently in the present case, is entitled to even greater deference than that usually paid to administrative constructions because Congress has, since *LADWP*, twice passed

With that principle in mind, there is no doubt that the Ninth Circuit properly upheld BPA's construction of the statutes at issue.

Section 837e, passed in 1964 as part of the Regional Preference Act, does not support petitioners' position. The statutory language simply requires BPA to make excess Intertie capacity available as a carrier. In the NTIAP, BPA certainly makes available excess Intertie capacity as a carrier for transmission of energy between the Pacific Northwest and California as well as between Canada and California; the whole point of the access policy is to state the conditions on which BPA will do just that. Petitioners can make no plausible showing that anything in the language of Section 837e constrains BPA's choice of conditions for nonfederal access to excess Intertie capacity or requires it to transmit Canadian power on the same terms as Northwest power. See Pet. App. E13-E16; see also 16 U.S.C. 838(a) (describing purpose of Regional Preference Act as "the marketing of electric power from hydroelectric projects in the Pacific Northwest").

Nor does the legislative history of the Regional Preference Act, read as a whole, support a reading of Section 837e that would require BPA to transmit Canadian power on the same terms as Northwest power. The House report

legislation on closely related matters and has specifically declined to overturn BPA's and the Ninth Circuit's statutory interpretations. See LTIAF Administrator's Decision 47 (quoting Pub. L. No. 99-88, 99 Stat. 293; 132 Cong. Rec. S 15388 (daily ed. Oct. 6, 1986)). "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974) (footnotes omitted)).

states that the Administrator “may” — not “must” — “enter into agreements for the wheeling of energy generated in Canada.” H.R. Rep. 590, 88th Cong., 1st Sess. 9 (1963).¹⁰ And Congress was well aware when it passed the Act that the Executive Branch officials responsible for its implementation understood the Act to require transmission of Pacific Northwest energy, not Canadian energy, over available Intertie capacity and to permit pro rata allocation.

The Department of the Interior (within which BPA was then located) reported to Congress that “BPA has assured the public and private utilities of *its service area* access over [BPA’s] lines to California, Nevada, and Arizona markets, proportionate to the respective surpluses of the various utilities.” U.S. Dep’t of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* 27 (Comm. Print 1964) (emphasis added) [hereinafter *Interior Department Report*]. The conference committee endorsed that report in recom-

¹⁰ The same sentence proceeds to say that “such energy stands on the same basis as any other non-Federal energy.” As the next sentence makes clear, however, the point of that statement is to clarify that Canadian energy, other than so-called “Canadian Treaty energy” given special rights by treaty and by statute (16 U.S.C. 837h), *lacks* priority rights to use of the Intertie. See H.R. Rep. 590, *supra*, at 9 (“It [Canadian non-Treaty energy] does not have the priority granted to Federal energy and Canada’s entitlement to downstream power benefits under the proposed treaty.”). The statement that Canadian energy “stands on the same basis as any other non-Federal energy” cannot fairly be read, in context, as supporting the proposition that Canadian energy *must* be afforded rights as great as those afforded to Northwest energy. Otherwise, BPA would have no incentive to provide *any* service to Canada if, when it did provide service, it had to be on the same terms as that provided to Northwest utilities.

mending passage of the Act. H.R. Conf. Rep. 1822, 88th Cong., 2d Sess. 3-4 (1964); see also *id.* at 5 (emphasis added) (reprinting letter from Secretary of the Interior stating that "the regional interties between the Pacific Northwest and the Pacific Southwest, as proposed by the Department of the Interior, * * * would link all major electric systems—public, private, and Federal—in both regions"). And BPA's earliest implementation of the legislation, in the Exportable Agreement, demonstrates BPA's longstanding view, never disturbed by the courts or by Congress,¹¹ that BPA has the authority to arrange pro rata allocations of Intertie capacity and to exclude Canadian energy.¹²

¹¹ On January 17, 1969, the Secretary of the Interior transmitted to the House Committee on Public Works Appropriations copies of the Exportable Agreement and other Intertie agreements for review, as required by congressional committees that approved appropriations for Intertie construction (H.R. Conf. Rep. 1794, 88th Cong., 2d Sess. 42 (1964); see S. Rep. 1326, 88th Cong., 2d Sess. 37 (1964)). We are lodging a copy of the Secretary's letter with the Clerk. Significantly, the parties to those agreements were limited to Northwest and Southwest utilities and did not include any Canadian utility. The Secretary stated, that the " 'fair share' or 'equitable sharing' of excess energy markets in California and the Northwest by all utilities desiring to use the Intertie for sale of excess energy" had been stressed by the Department to Congress. He concluded that "[t]he enclosed agreements have been negotiated with the intent to satisfy these prior commitments contractually." As the court below stated (Pet. App. B14-B15, quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)):

Congress has, for nearly half a century, monitored BPA performance in electricity regulation and allocation. Statutory interpretations offered by BPA represent "contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are as yet untried and new."

¹² Furthermore, throughout the legislative history all who described the benefits that would accrue from an Intertie system discussed

Petitioners place greater emphasis on the requirement of "fair and nondiscriminatory" availability of Intertie capacity in 16 U.S.C. 838d, added by the Transmission System Act in 1974, but that language also will not bear the weight petitioners place on it. The legislative history shows that the sole purpose of Section 838d was to make clear BPA's obligation to treat publicly owned utilities and investor-owned utilities alike in granting access to its transmission system. See H.R. Rep. 93-1375, 93d Cong., 2d Sess. 5 (1974) ("Section 6 [16 U.S.C. 838d] provides that the Administrator of BPA shall not discriminate between public and private power entities in contracting for use of transmission line capacity which is surplus to the Administrator's requirements for transmitting Federal power.").¹³ It would be a serious misreading of Section 838d to construe the statute as a roving mandate for courts to require "equal" treatment of any two utilities that a court might regard as similarly situated.¹⁴

benefits accruing to the Pacific Northwest and the Pacific Southwest. See H.R. Conf. Rep. 1822, *supra*, at 7 (reprinting letter from Secretary of the Interior); H.R. Rep. 590, *supra*, at 2; *Interior Department Report* 32. No mention was made of Canada, either in relation to the benefits flowing to Canada or in relation to California benefits as being dependent on the flow of non-Treaty Canadian power. Indeed, even Canadian Treaty power was power generated in the Northwest and owned by entities in the Northwest after a power sales transaction that was closely tied to the ratification of the Treaty by Canada (*Interior Department Report* 33).

¹³ This statutory provision thus stands in contrast to BPA's obligation as a seller (rather than transmitter) of power "at all times * * * [to] give preference and priority to public bodies and cooperatives" (16 U.S.C. 832c(a)).

¹⁴ It would be an even more radical departure from congressional intention to read Section 838d as an open-ended invitation for courts to determine what constitutes "fair[ness]" and "discriminat[ion]" in the relative treatment of the Pacific Northwest and California. That

In particular, it would be directly contrary to Congress's intention if the statute were read to mandate identical treatment of generating utilities in Canada and the Pacific Northwest. See H.R. Rep. 93-1375, *supra*, at 5 ("The Committee further expressly points out that Section 6 is not intended to represent a policy having application other than in the Pacific Northwest * * *"); S. Rep. 93-1030, 93d Cong., 2d Sess. 10 (1974) (same); *id.* at 9 (emphasis added) (describing overall purpose of Transmission System Act as "carry[ing] out the directives and policies contained in previous legislation relating to the production and distribution of electrical power *in and from the Pacific Northwest*").

novel statutory construction, first adopted by Judge Norris in dissent below (Pet. App. A25-A26 & n.1) and now echoed by petitioner CEC, finds no support in any legislative history or any judicial interpretation of similar phrases, and it would send the courts on a wholly uncharted journey. For example, whereas petitioners can decry perceived discrimination and unfairness in BPA's failure to let market forces operate on the northern portion of the Intertie, Northwest utilities and consumers could just as easily decry perceived discrimination and unfairness if BPA failed to take steps to counteract the monopsony power of the owners of the southern portion of the Intertie. Likewise, while petitioners insist that BPA should be judicially required to raise its rates to Northwest customers rather than recovering costs from California customers (CEC Pet. 25-26), a FERC administrative law judge has criticized BPA for "grossly undercharg[ing]" nonfirm customers (which were principally in California and the Southwest), resulting in unfair treatment of BPA's firm customers, which are in the Northwest. *U.S. Department of Energy, Bonneville Power Administration*, 29 F.E.R.C. ¶ 63,039, at 65,122 (1984). In any event, BPA has studied the relevant benefits that the Intertie would provide to each region with and without the adoption of an access policy and has determined that an access policy does in fact distribute the benefits to each region more equally than would market forces operating in the absence of such a policy, which would allow California a disproportionate share of the benefits (Pet. App. E37-E39; LTIAP Administrator's Decision 168-171).

In sum, there is no statute that can fairly be construed to impose on BPA an obligation to give identical treatment to Pacific Northwest energy and extraregional energy in allocating access to the Intertie, nor can any statute even remotely be read to forbid BPA's adoption of a pro rata allocation system among those to whom Intertie access is granted.¹⁵

c. Contrary to petitioners' assertion, the decision of the court of appeals regarding antitrust considerations does not conflict with any decision of this Court.¹⁶ Peti-

¹⁵ In addition, construing Section 837e or Section 838d to require BPA to afford "equal access" to extraregional utilities would create serious anomalies in the overall statutory scheme. To take one example, the Regional Preference Act places significant restrictions on BPA and Northwest utilities with respect to the transactions they make with California utilities in order to preserve for Northwest use the region's significant hydroelectric potential. BPA cannot sell surplus energy without a contractual right to terminate the sale on 60 days' notice if the energy is needed in the Northwest (16 U.S.C. 837b(a)). Nonfederal Northwest utilities cannot sell firm hydroelectric surplus energy to California without suffering a decrement in their ability to rely on BPA for firm power (16 U.S.C. 837b(d)). No such statutory limitations have ever been placed on Canadian or other extraregional utilities. To argue that Congress intended extraregional utilities to be treated equally to Northwest utilities is to argue that Congress intended Northwest utilities to compete at a disadvantage with extraregional utilities. See Pet. App. E184-E190.

¹⁶ The decision, however, is the first in which a nonregulatory federal agency's obligation to consider the effect of its policies on competition has been decided. The cases that petitioners cite involve only regulatory agencies implementing their own unique statutory directives. See generally *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 959 (D.C. Cir. 1968). Though federal agencies are not governed by the antitrust laws (*Jet Courier Serv. v. Federal Reserve Bank*, 713 F.2d 1221 (6th Cir. 1983); *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982); *Champaign-Urbana News v. J.L. Cummins*, 632 F.2d 680 (7th Cir. 1980)), BPA itself undertook a consideration of the NTIAP's effects

tioners, relying on *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 763 (1973), contend that the court of appeals did not "closely scrutinize" BPA's adoption of the NTIAP in light of antitrust concerns (CPUC Pet. 14). Petitioners misread *Gulf States* and its application to the present case.

In *Gulf States*, the Court recognized that the Federal Power Commission had an obligation, under its Federal Power Act directive to protect the "public interest" (16 U.S.C. 824c(a)), to "consider anticompetitive aspects" of its actions, but the Court also recognized that the Commission had discretion in the manner in which it did so (411 U.S. at 762-763). Only if the Commission had summarily disposed of antitrust concerns, or failed to consider such concerns at all, was the reviewing court's "close scrutiny" of the Commission's exercise of its discretion triggered (*id.* at 763). See also *Maryland People's Counsel v. FERC*, 761 F.2d 780, 785-786 (D.C. Cir. 1985).

In the present case, as the court of appeals recognized, BPA considered anticompetitive aspects of the NTIAP (Pet. App. A18-A19). Unlike the Federal Power Commission in *Gulf States*, BPA neither failed to consider anticompetitive aspects nor summarily disposed of such concerns. Accordingly, the court of appeals was correct in restricting its review of BPA's adoption of the NTIAP to determining whether BPA had struck a reasonable balance

on competition during the development of the NTIAP. Pet. App. E63-E84, F1-F4, F5, G5, H2, H10-H17, H21-H31, H71-H76. Consequently, if there is any real issue here, it is whether BPA's duty to consider such effects is *less* stringent than that of regulatory agencies with jurisdiction over private behavior in the marketplace. Compare the "public interest" standard of the *Gulf States* case (discussed below) with the precautionary standard in Section 9(i)(3) of the Northwest Power Act, 16 U.S.C. 839f(i)(3), that access should be granted to BPA's transmission facilities only if such services can be furnished "without substantial interference with [the Administrator's] power marketing program."

between antitrust concerns and BPA's statutory obligation to be fiscally self-supporting (Pet. App. A15-A20).

Petitioners also contend that BPA is obligated to "maintain[] competition to the maximum extent possible consistent with the public interest" (CPUC Pet. 14, citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973)), and to conform its conduct, "to the maximum feasible extent," to antitrust policies (CEC Pet. 24, citing *Latin America/Pacific Coast Steamship Conf. v. Federal Maritime Comm'n*, 465 F.2d 542, 547 (D.C. Cir.), cert. denied, 409 U.S. 967 (1972), and *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)). Apparently, petitioners would have BPA take extraordinary steps, at the expense of all other considerations, to accommodate antitrust concerns. Neither the decisions of this Court nor those of any court of appeals impose such a requirement.

In *Otter Tail*, contrary to petitioners' implication, the issue before the Court was not whether a regulatory agency must maintain competition to the maximum extent possible. Rather, it was whether Congress intended to exempt electric utilities from antitrust liability in court when it provided the Federal Power Commission with the regulatory responsibilities contained in the Federal Power Act, 16 U.S.C. 791a *et seq.* Because "the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest" (410 U.S. at 374), the Court held that it could not assume that Congress intended such an exemption. The Court's opinion in *Gulf States*, issued less than three months after *Otter Tail*, underscores the point. In *Gulf States*, the Court merely held that the Federal Power Commission had a "responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate util-

ity operations" (411 U.S. at 758-759). The Court did not hold that the Commission had to maintain competition to the maximum extent possible. Similarly, the court of appeals in the present case held that BPA has an obligation to consider "the interests of preserving competition" (Pet. App. A15-A16). Thus, the balancing approach recognized by the court of appeals in the present case is precisely the approach taken by this Court in prior cases.

Nor do the other cases on which petitioners rely support their contention that BPA is required to take extraordinary steps to accommodate antitrust concerns. In *Latin America/Pacific Coast Steamship*, the D.C. Circuit recognized that an agency's statutory obligations may override antitrust concerns (465 F.2d at 547). It was also interpreting a different statute, the Shipping Act, 1916, 46 U.S.C. 801 *et seq.*, the history of which led the court to conclude that Congress "intended to tolerate only the minimum anticompetitive behavior * * * in the maritime industry" (465 F.2d at 551-552 (emphasis omitted), quoting *Seatrains Lines, Inc. v. Federal Maritime Comm'n*, 460 F.2d 932, 940 (D.C. Cir. 1972)). Similarly, in *Northern Natural Gas*, the D.C. Circuit expressly recognized the balancing approach set forth in *Gulf States* and followed by the court of appeals in the present case (399 F.2d at 961). Thus, there is no merit to petitioners' contention that the court of appeals' decision in the present case conflicts with any decision of this Court or any other court of appeals.

Furthermore, to whatever extent BPA may be said to have a nonstatutory yet judicially enforceable duty to promote competition, the pro rata allocation of Intertie access among BPA and other Northwest utilities furthers rather than hinders the goal of most closely approximating competitive conditions. As the Administrator has recently emphasized, "[p]ro-rata allocations under various Intertie

access policies have always been intended to mirror and offset pro-rata allocations in the Southwest. California commenters argue that pro-rata allocations under the LTIAP tend to stabilize prices at levels higher than where sellers may increase their total sales by reducing prices. It is equally logical to conclude that pro-rata allocations of California Intertie capacity suppress prices below levels that would prevail in a market where more buyers bid independently." LTIAP Administrator's Decision 61-62 (footnote omitted); see also Pet. App. A18-A20.

Although petitioners insist that BPA cannot take such considerations into account because it "is *not* a regulatory agency" (CEC Pet. 27 (footnote omitted)), petitioners cannot have it both ways. If BPA, because it is a federal agency, is to be assigned the responsibility to weigh competitive considerations in its decisionmaking, then there is no reason why BPA must close its eyes to the competitive consequences of all actions but its own.¹⁷ BPA properly

¹⁷ In arguing that "BPA ignored the well-settled rule that those who commit antitrust violations may not justify such conduct on the ground that it was undertaken to compensate for or retaliate against antitrust violations by their adversaries" (CEC Pet. 27), petitioners err by treating BPA as if it were an entity that could "commit antitrust violations." BPA is a federal agency and is thus exempt from the antitrust laws; any bearing that antitrust considerations have on BPA's decisionmaking derives simply from the obligation every federal agency has to consider relevant factors in making decisions. See, e.g., *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). Factors that may not justify a private actor's conduct may nevertheless be appropriate considerations for a federal agency. Moreover, petitioners err in their implicit assumption that it would necessarily violate the antitrust laws for a private utility that owned a transmission line to allocate its sales of transmission services on a pro rata basis. Although the *joint* owners of a "bottleneck monopoly" facility may be required to give their competitors nondiscriminatory access to that facility (*United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 410-411 (1912)),

considered the relative market power of the southern Intertie owners and Northwest utilities in formulating its Intertie access policies.¹⁸

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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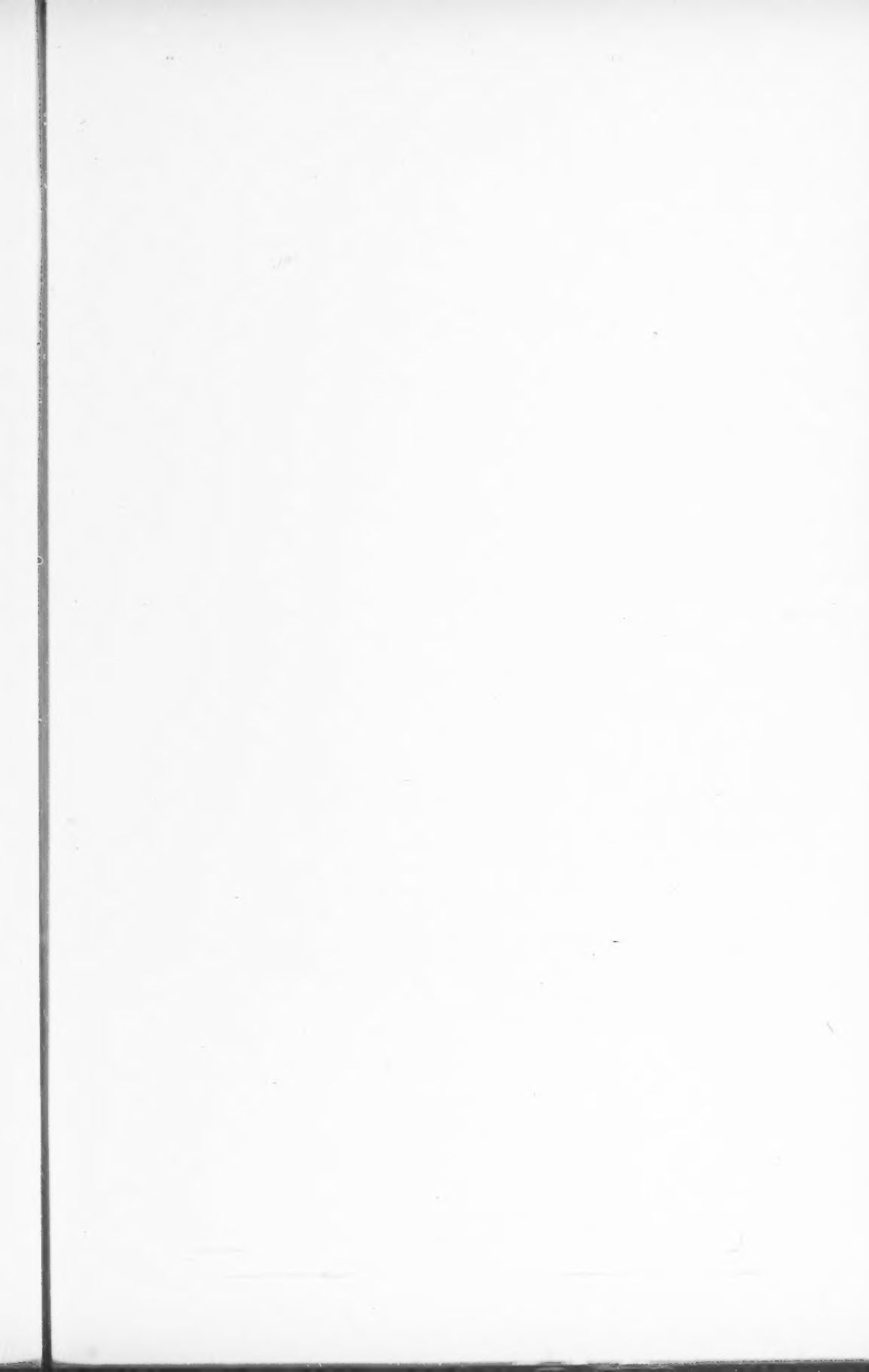
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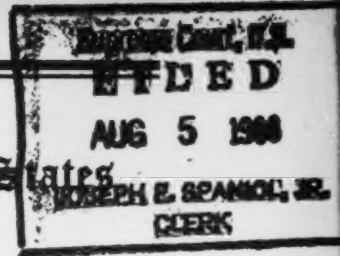
AUGUST 1988

and the sole owner of such a facility may in some circumstances be forbidden to *exclude* its competitors from access to that facility (*Otter Tail Power Co. v. United States, supra*), we are unaware of any antitrust case that goes so far as to require the owner of such a facility to let market forces rather than a pro rata allocation system dictate access to the facility.

¹⁸ Petitioners are also in error in suggesting (CEC Pet. 25) that BPA does not enhance its own ability to collect revenues, and thus to meet its obligation to be self-financing, by aiding the market power of Northwest utilities. The Administrator has explained in the recent decision supporting the LTIAP the indirect revenue effects on BPA of increasing or decreasing the revenues of Northwest utilities (LTIAP Administrator's Decision 50-51, 61 n.18).



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Supreme Court of the United States
OCTOBER TERM, 1988



CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION,

Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, *et al.*,

Respondents.

CALIFORNIA PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

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**BRIEF AMICI CURIAE OF CALIFORNIA UTILITIES
IN SUPPORT OF PETITIONS
FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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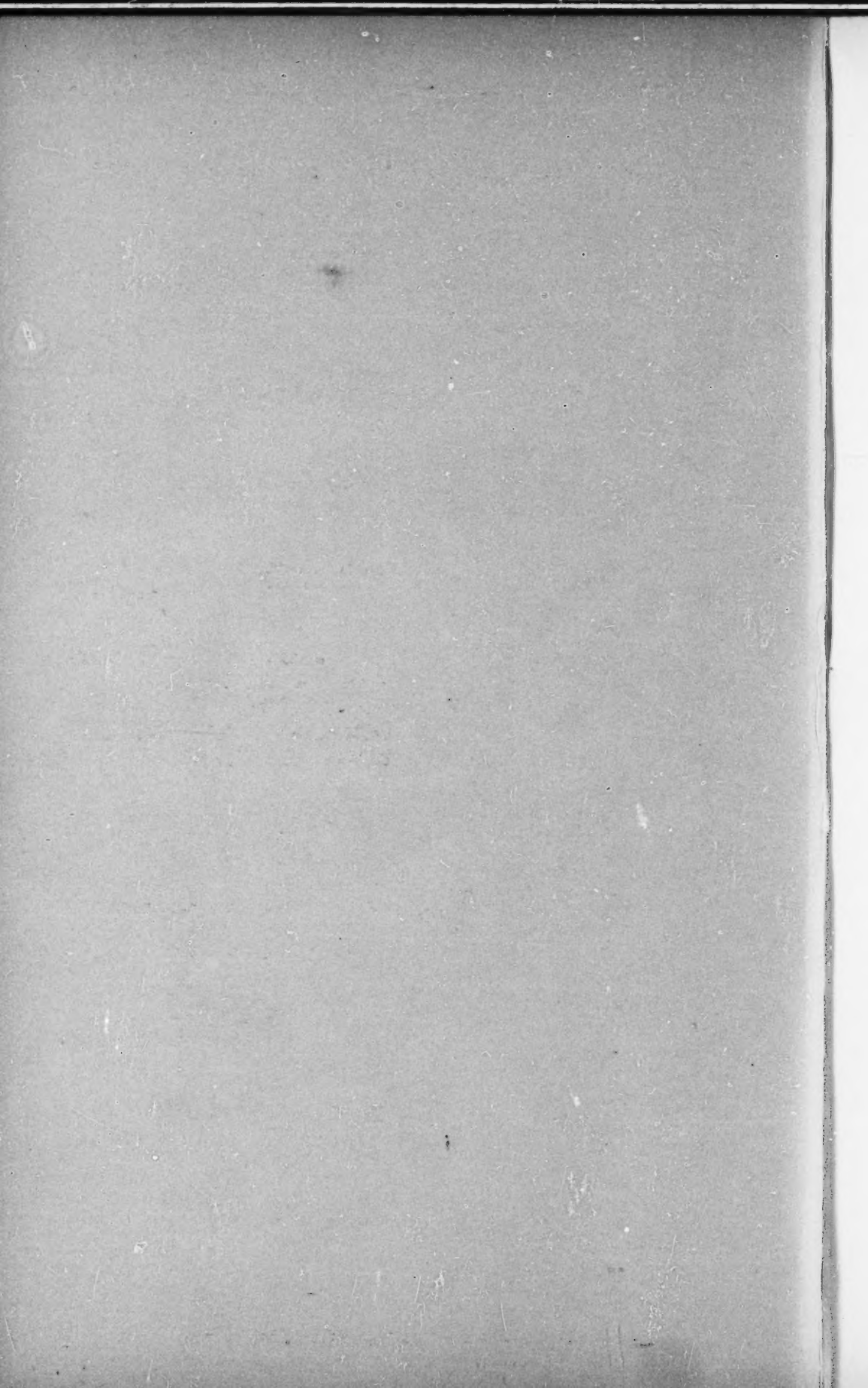


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TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

The Department of Water and Power of the City of Los Angeles, the Public Service Department of the City of Burbank, the Public Service Department of the City of Glendale, the Water and Power Department of the City of Pasadena, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company (herein-

after collectively referred to as the "California Utilities") submit this brief *amici curiae* in support of the petitions for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit. Consents to the filing of the brief have been obtained from all parties and have been filed with the Clerk.

INTEREST OF THE CALIFORNIA UTILITIES

The California Utilities are investor- and municipally-owned electric utilities serving a population of approximately 25 million electric consumers in the State of California. Since 1969, when the first extra-high voltage "Intertie" transmission lines between California and the Pacific Northwest were energized, the California Utilities have purchased substantial quantities of capacity and energy from Bonneville Power Administration ("BPA"), a Federal power marketing agency, and from Pacific Northwest and Canadian electric utilities. In 1985 alone, the California Utilities purchased approximately \$400 million of capacity and energy from BPA, with Pacific Gas & Electric Company, Southern California Edison Company, and the Los Angeles Department of Water and Power as BPA's first, second, and eighth largest customers that year, respectively. All of these sales by BPA to California and the majority of sales to California by other Pacific Northwest electric utilities were delivered over Pacific Intertie transmission facilities governed by BPA's Intertie Access Policy, the subject of the proceeding below. To the extent BPA continues to be successful in using the horizontal market allocation scheme and other anticompetitive provisions of its Intertie Access Policy artificially to

maintain or increase the prices charged California, the California Utilities and their ratepayers will be directly and adversely affected.

In addition, the California Utilities are involved in the construction and planning of new or expanded transmission facilities between the two regions. The continued application of BPA's restrictive Intertie Access Policy is likely to have an adverse impact on the economic viability of these projects and thereby on the interstate commerce in electric capacity and energy in the Western United States and Canada.

For these reasons, and as discussed in more detail below, the California Utilities and their millions of ratepayers have a direct and substantial interest in the outcome of this case.

REASONS FOR GRANTING THE WRIT

The California Utilities fully concur in the arguments presented by the California Energy Resources Conservation and Development Commission in No. 87-1835, and the California Public Utilities Commission in No. 87-1836, for granting a writ of certiorari to review the judgment and opinion of the Ninth Circuit. The California Utilities submit this brief to direct the Court's attention to the significant and adverse impacts of BPA's Intertie Access Policy, upheld by the decision below, on the California Utilities and their ratepayers.

Of all the problems currently faced by the suppliers and consumers of electricity in the State of California, few are more important than the one that underlies the question presented in this case. While the problem is unique to the Pacific Northwest and Southwest

areas, and therefore can arise in only one circuit, the amounts of money involved and the number of people affected are so large that the issue is too important not to be decided by this Court.

BPA, a federal agency acting in a proprietary capacity, has created an Intertie Access Policy that severely distorts the market for bulk electric power in the Western United States and Canada for the economic benefit of the Pacific Northwest region and to the detriment of the Pacific Southwest, especially California. As Judge Norris stated in his dissent below, it is "a scheme which if implemented by a private party would plainly violate the antitrust laws." App. at A26¹, 831 F.2d at 1479. Even the majority below acknowledged the anticompetitive nature of the Access Policy:

The result [of the Access Policy's formula allocation] is a regularly shifting, horizontal division of the market for surplus nonfirm energy; each eligible producer is temporarily granted sole access to a specified share of the capacity, which it may either use or allow to remain unused without fear of competition by other producers.

App. at A16, 831 F.2d at 1475. The result of BPA's anticompetitive Policy has been to charge the California Utilities and their ratepayers hundreds of millions of dollars more than they would have been charged without the horizontal market allocation and other market restrictions imposed by BPA.

¹ References to "App." are to the Appendix submitted by the Petitioners in Nos. 87-1835 and 87-1836.

The anticompetitive impact of BPA's Intertie Access Policy will continue and perhaps increase absent review by this Court. BPA recently has attempted to establish "market-based" (*i.e.*, whatever the market will bear) pricing for transmission and power services to the California market. Thus, BPA seeks to obtain market prices for its services while it controls that market by restricting the access of low-cost producers of electricity to its surplus interregional transmission facilities, for the express purpose of increasing and maintaining price levels on sales to California.

Finally, BPA's Intertie Access Policy distorts not only the operation of the bulk power market in the Western United States, but also its structure. BPA's Policy makes it less likely that additional interregional transmission facilities will be built, thereby reducing commerce in electric capacity and energy between the two regions and foregoing benefits to both regions from otherwise economic transactions.

A. BPA's ANTICOMPETITIVE ACCESS POLICY HAS COST CALIFORNIA ELECTRIC CONSUMERS HUNDREDS OF MILLIONS OF DOLLARS IN EXCESSIVE CHARGES FOR ELECTRIC POWER.

The petitions of the California Commissions provide considerable detail concerning the Pacific Intertie, BPA's Intertie Access Policy, and the bulk power market in the Western United States and Canada.² Briefly, California is the major market for bulk electric power suppliers in the West. Pacific Northwest

² See also the decision below, App. A, 831 F.2d 1467; *Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration*, App. B, 759 F.2d 684 (9th Cir. 1985).

and Canadian power producers, and especially BPA, have a natural, competitive advantage in that market due to their vast, low-operating-cost hydroelectric resources, which can be used to displace more expensive oil- and natural gas-fired generation in California. This advantage is especially pronounced during periods of relatively high oil and natural gas prices.

The delivery to California of power from the Pacific Northwest and Canada takes place over the Pacific Intertie, a system of extra-high voltage transmission lines connecting the Pacific Northwest and California. The northern portion of the Intertie is owned principally by BPA. Prior to September 1984, BPA generally allowed access to all, including Canadian utilities, on a first-come, first-served basis to surplus capacity on BPA's portion of the Intertie. Because the Intertie has a finite capacity and because the Pacific Northwest and Canada at times have heavy streamflows that result in substantial quantities of hydroelectric energy being available, the supply of power sometimes exceeded the effective demand, *i.e.*, the capacity of the Intertie. The natural, competitive effect was to reduce the price BPA and others could obtain for the power at those times.

In an effort to increase and maintain prices to California at higher levels,³ BPA in 1984 instituted its

³ App. at E4-E5 (Intertie Access Policy seen as solution for power glut in Pacific Northwest that reduced prices for power sold over the Intertie); App. at E79 ("The Near Term Intertie Access Policy increases the market power of Pacific Northwest sellers relative to that of California buyers. . . . This may result in higher prices for economy energy purchased from Pacific Northwest sellers."); *see* App. at F1-F2 (experience under first six months of Intertie Access Policy indicated increased sales and revenues to BPA and Pacific Northwest utilities).

Intertie Access Policy, which among other things includes a horizontal market allocation scheme for spot market sales to the California market over the Intertie. The scheme prefers Northwest power suppliers over all others and also protects those Northwest suppliers from competition among themselves by horizontally dividing access to the Intertie among them. BPA allocates to itself and Pacific Northwest generating utilities fixed hourly shares of its Intertie capacity in proportion to the amount of energy each declares available each hour. Nonregional sellers, such as those in Canada, are denied access to the California spot market much of the time and, during the limited times they are allowed access, obtain it only after all Pacific Northwest sellers' demands for access have been satisfied.

By allocating fixed shares of its Intertie capacity, BPA ensures that its goal of increasing and maintaining prices to California will be met. No utility can resort to price competition to increase its market share, because no additional Intertie capacity can be obtained, even if another utility's allotted capacity goes unused. As Judge Norris aptly observed in his dissent, the scheme "restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy" by creating "a cartel for the Northwest utility companies in the sale of power to the Southwest." App. at A26, 831 F.2d at 1479. Despite its intended effect on prices paid by California, BPA did not submit its Policy to the ratemaking process established by statute.⁴

⁴ Pacific Northwest Electric Power Planning and Conservation

BPA's Intertie Access Policy had its intended effect. By eliminating price competition among the low-cost Pacific Northwest power suppliers in the West Coast bulk power market and by eliminating Canadian

Act of 1980, §7, 16 U.S.C. §839e. In its decision below, the Ninth Circuit rejected the contention that BPA's action in implementing its Intertie Access Policy constituted ratemaking subject to review by the Federal Energy Regulatory Commission. The Ninth Circuit concluded that the Policy did not constitute ratemaking because it altered neither BPA rates or prices, nor the availability provisions of BPA rate schedules. App. at A11-A12, 831 F.2d at 1473.

The court was wrong on both counts. Although BPA did not change its *rates* for nonfirm energy, it did change the effective *price* charged California customers for such energy by eliminating competitive forces in the Pacific Northwest that had kept prices under BPA's flexible rate schedule relatively low at certain times. The Ninth Circuit held in an earlier case that BPA actions that lower the price paid for BPA energy constitute ratemaking even if the rate schedule itself remains unchanged. *California Energy Resources Conservation & Development Commission v. Bonneville Power Administration*, 754 F.2d 1470, 1474 (9th Cir. 1984), *cert. denied*, 474 U.S. 1005 (1985).

The Ninth Circuit's conclusion that availability provisions had not been changed was similarly flawed. For example, BPA's 1983 transmission rate schedules, in effect at the time the Intertie Access Policy was implemented, stated that BPA transmission was available on a fair and non-discriminatory basis to all utilities. BPA 1983 Transmission Rate Adjustment, 48 Fed. Reg. 12,766, 12,772 (March 28, 1983) ("Any capacity in the [Federal Columbia River Transmission System] which BPA determines to be in excess of the capacity required to transmit Federal power will be made available to all utilities on a fair and nondiscriminatory basis. . . ."). The Intertie Access Policy altered this general availability of BPA's transmission by excluding nonregional utilities from the Intertie much of the time.

The petition in No. 87-1836 seeks review of these errors. Petition of California Public Utilities Commission at 8-11.

suppliers entirely when they would otherwise compete, BPA established a price floor on sales to California, set just below the price of alternative power supplies available to California from indigenous generation or from non-Pacific Northwest suppliers—generally higher priced, fossil-fuel generation. In effect, BPA eliminated the market incentives for low-cost suppliers to increase sales to California by lowering their prices.

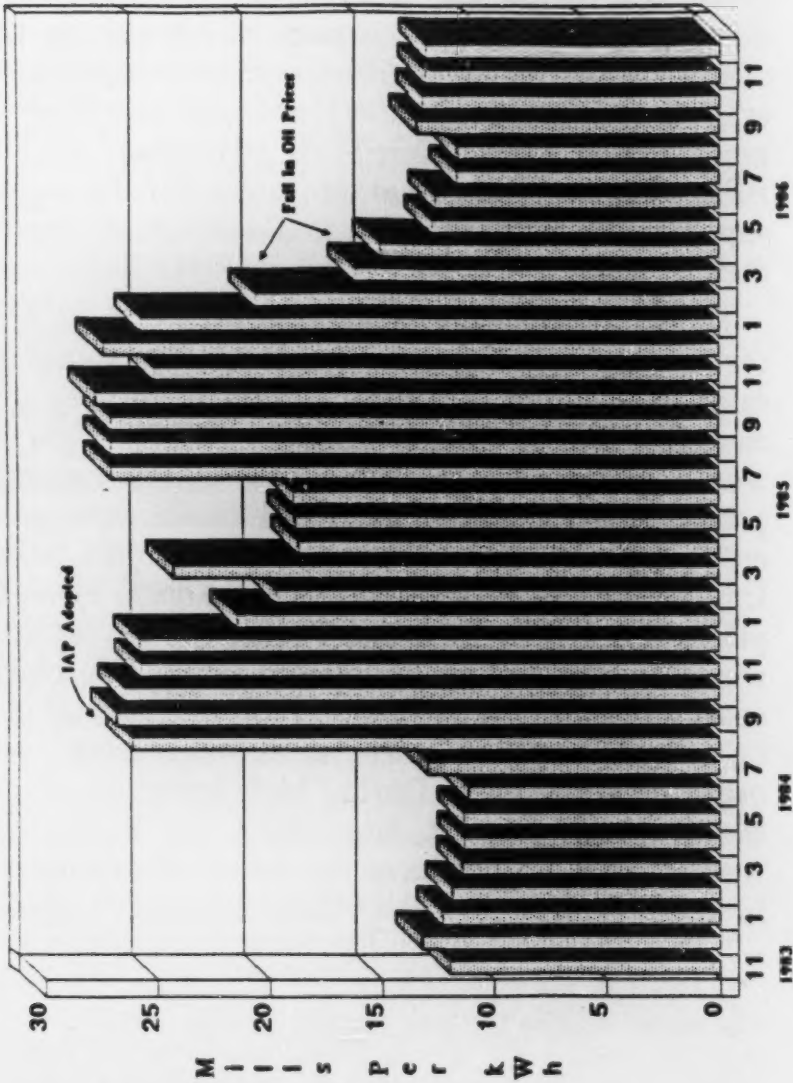
Table 1 graphically shows the effect of BPA's Intertie Access Policy on price levels for spot energy sales to California.⁵ BPA's Intertie Access Policy caused prices to double. These artificially high prices were maintained until decreases in oil and natural gas prices in early 1986 introduced to the market low-cost supplies of power that were not subject to BPA's Intertie Access Policy control mechanism. Even then, prices charged by BPA and Pacific Northwest utilities were often at artificially inflated levels. The marginal cost of producing an additional kilowatthour of energy on a hydroelectric system is extremely low, on the order of a few mills. During high water conditions in the Pacific Northwest, when BPA and Pacific Northwest utilities do not have the option of storing water in their reservoirs rather than using it to generate

⁵ Although the table reflects only BPA prices, the prices are also representative of those charged by other Pacific Northwest suppliers. Before the Access Policy was in effect, competition among Pacific Northwest suppliers, including BPA, kept prices at or near a market equilibrium level. Following implementation of the Access Policy, there was no reason for Pacific Northwest suppliers to reduce their price below the higher level established by BPA, since the fixed allocation procedure of the Policy prevented them from increasing their share of the market no matter how low they reduced their price.

TABLE 1

BPA SPOT MARKET ENERGY PRICES TO CALIFORNIA

(November 1983 - December 1986)



Source: *Intertie Access Policy of the Bonneville Power Administration: Oversight Hearing Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs, 100th Cong., 1st Sess. 623 (1987)*

energy, competition would normally result in prices approaching marginal costs. As shown on Table 1, prices did not drop to such levels, but rather to levels just below the price of the reduced-cost, oil- and natural gas-fired alternatives available to California. Thus, even when oil and natural gas prices are low, California consumers pay a surcharge margin on their purchases from Pacific Northwest suppliers that results solely from BPA's Intertie Access Policy. Moreover, whatever price relief has been obtained through the low oil and natural gas prices will last only as long as those prices remain low. When oil and natural gas prices rise, the price of BPA and Pacific Northwest energy for sale to California will march in step upward, protected from intraregional price competition by BPA's Intertie Access Policy.

It is difficult to be precise in estimating the aggregate dollar impact of the Intertie Access Policy on prices to California; several variables, such as water conditions, demands for power in California and the Pacific Northwest, and available Intertie capacity also have an impact on price and purchases. However, a February 1988 study by Decision Focus Incorporated for Pacific Gas & Electric Company analyzed the effect of BPA's Intertie Access Policy on prices to California, adjusting for such variables.⁶ The study concluded that the Access Policy resulted in cartel pricing by BPA and Pacific Northwest utilities for spot market energy sold to California, with prices approximately 8 mills per kilowatthour greater during the period between late 1984 and mid 1987 than they

⁶ Decision Focus Incorporated, *An Economic Analysis of Bonneville Power Administration's Intertie Access Policy* (February, 1988) (unpublished report).

would have been absent the Intertie Access Policy. Applying this margin to the approximately 11 million megawatthours of 1985 spot market purchases by the California Utilities from BPA alone results in a figure of \$88 million in excessive payments by *amici* to BPA in one year as the direct result of the anticompetitive effect of the Access Policy. Moreover, because BPA typically represents roughly two-thirds of the Pacific Northwest energy sales to California, the total effect of BPA's elimination of competition within the Pacific Northwest on charges to the California Utilities in 1985 was probably fifty percent greater, or \$132 million. The overcharges to all California consumers, including those not participating as *amici* here, would be even greater. It is therefore apparent that BPA's Intertie Access Policy has already cost California electric consumers hundreds of millions of dollars in charges resulting solely and intentionally from conduct "which if implemented by a private party would plainly violate the antitrust laws". App. at A26, 831 F.2d at 1479 (Norris, J., dissenting). Unless the Policy is reviewed by this Court and reversed, this injury to California electric consumers will continue.

B. THE ADVERSE IMPACT OF BPA's INTERTIE ACCESS POLICY ON CALIFORNIA IS LIKELY TO INCREASE.

As noted above, and as shown on Table 1, the price-fixing margin BPA and other Pacific Northwest suppliers are able to obtain from California due to the Access Policy's cartel pricing scheme depends in part on oil and natural gas prices. If these prices are relatively low, the California Utilities can run their own generation or purchase from non-Pacific Northwest suppliers, thereby forcing BPA and other Pacific

Northwest suppliers to reduce somewhat their margin. However, the last two decades have demonstrated the potential upward volatility of oil and natural gas prices. Should these prices again escalate, BPA's Intertie Access Policy will enable Pacific Northwest suppliers to increase the prices charged for their low-cost hydroelectric generation to even higher levels.⁷

BPA has set the stage to take even greater benefit from such future increases in oil and natural gas prices. In the past, BPA has generally tied its rates

⁷ On May 17, 1988, BPA issued a Long Term Intertie Access Policy, 53 Fed. Reg. 24,483 (June 29, 1988), which supersedes the Near Term Intertie Access Policy litigated below. The Long Term Policy is functionally indistinguishable from the previous Policy, except that BPA has proposed an "experiment" under which some competition will be permitted at certain periods. The experiment is subject to BPA's control and discretion. BPA will design the experiment, decide when it will begin, and judge the outcome based on its views of whether a competitive market exists on the West Coast. As discussed in detail in the petitions of the California Commissions, BPA, a proprietary agency with Pacific Northwest, not national, interests in mind, is particularly unsuited to the task of judging the competitiveness of that market.

Most importantly, the "experiment" is just that—an experiment. If BPA determines, in its sole discretion, that the "experiment" is unsuccessful, it will return to the stated allocation provisions of the Long Term Intertie Access Policy—provisions identical to those at issue here. For this reason, it would be inappropriate to defer review of the critical issues raised here simply because BPA has issued a revised policy that, except for a temporary, experimental variance, is identical to the Policy under consideration. To the contrary, delayed review could result in additional hundreds of millions of dollars in excessive charges to California consumers.

in some way to its costs. Recently, however, BPA has established upwardly flexible rates for sales to California, under which BPA can adjust prices above its costs if market conditions permit.⁸ The Federal Energy Regulatory Commission recently rejected one of these rates, precisely because it permitted BPA to charge market-based prices in a market BPA controls through the Intertie Access Policy.⁹ BPA responded by restructuring the rate so as to avoid FERC review of the market in which the rate operates. BPA 1988 Proposed Modification of Rate Schedule SL-87, 53 Fed. Reg. 25,531 (July 7, 1988).¹⁰ Absent review

⁸ See BPA 1985 Proposed Wholesale Power Rate Adjustment, 49 Fed. Reg. 35,177, 35,191-93 (Sept. 6, 1984) (discussion of NF-85 Nonfirm Energy rate); BPA 1987 Proposed Wholesale Power Rate Adjustment, 51 Fed. Reg. 47,108, 47,120-22, 47,124-25 (Dec. 30, 1986) (discussion of SL-87 Long-Term Surplus Firm Power, SP-87 Surplus Firm Power, and NF-87 Nonfirm Energy rates).

⁹ "SL-87 amounts to a flexible pricing scheme. Typically, pricing flexibility should only be allowed in a competitive market or where the seller does not possess significant market power. We do not believe that BPA has demonstrated satisfactorily that either of these conditions exist." *United States Department of Energy—Bonneville Power Administration*, 43 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,032 at 61,086 (1988).

¹⁰ BPA accomplished this by eliminating the availability of the rate to California customers. The statutes governing BPA distinguish between rates for regional and nonregional customers in the type of review given the rates by the Federal Energy Regulatory Commission. *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1110 (9th Cir. 1984); *United States Department of Energy—Bonneville Power Administration*, *supra*. By limiting the rate to regional customers, BPA invokes regional rate standards of review, and effectively forecloses the FERC from reviewing the competitive context in which the rate op-

by this Court of the Ninth Circuit decision below, BPA will continue to have the ability to assert control over the price of power sold to California.

C. BPA's INTERTIE ACCESS POLICY AFFECTS CALIFORNIA LONG-TERM PLANNING AND HAS AN ADVERSE EFFECT ON INTERSTATE COMMERCE.

BPA's restrictive Intertie Access Policy does not just distort the price California pays for Pacific Northwest Power; it also adversely affects planning decisions by California and Pacific Northwest utilities and regulators. One of the primary reasons for the initial construction of the Pacific Intertie was to take advantage of seasonal load diversities between the two regions. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3343. Because California is a summer-peaking region and the Pacific Northwest is winter-peaking, the interconnection of the two regions offered significant opportunities for the sharing of generating resources, to the economic benefit of both regions and the Nation as a whole.

The opportunities for such benefits still exist, and have led to proposals for additional interregional Intertie capacity to be constructed. Energy and Water

erates. *United States Department of Energy—Bonneville Power Administration, supra*. BPA's modification of the SL-87 rate does not mean that BPA power will not find its way to California, but rather that such power will be sold to Pacific Northwest entities, who will then "arbitrage" it to California at market prices, protected by the price floor established by the Intertie Access Policy. *See Aluminum Company of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 388 n.7 (1984) (discussing arbitrage by Pacific Northwest utilities).

Development Appropriation Act, 1985, 98 Stat. 403, 416 (1984). However, before California investor-owned utilities can participate in such projects they must receive authorization from state regulators, who review the economic viability of a proposed project by weighing the proposed expenditures against the benefits likely to be obtained. Because BPA's Intertie Access Policy shifts the economic benefits of interregional transmission facilities dramatically to Pacific Northwest power suppliers, and away from potential California participants in such transmission projects, it jeopardizes the authorization by California regulators of the utilities' investment in new interregional transmission capacity. See *Public Utilities Commission of the State of California*, Decision 86-07-004, mimeo. at 62 (July 2, 1986). The consequence may be reduced commerce in the Western United States, inefficient utilization of existing generating capacity, and the planning and construction of expensive new generation that otherwise could be deferred.

It would be particularly ironic if BPA's Intertie Access Policy were to be responsible for the demise of additional interregional transmission facilities. BPA itself has acknowledged that such additional transmission would resolve many of its concerns with a market imbalance that BPA perceives between the two regions, a factor which purportedly justifies the Access Policy. *E.g.*, App. at E75-E79. However, BPA's artificial cure for the asserted market imbalance—the Intertie Access Policy—may threaten the true cure: construction of additional transmission. By artificially raising prices, BPA reduces potential savings to California and, thereby, the economic viability of the additional transmission. Thus, BPA's Policy is

likely to create and maintain market distortion, not cure it.

CONCLUSION

For the reasons stated above and in the papers submitted by the California Energy Resources Conservation and Development Commission and the California Public Utilities Commission, the petitions for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CALIFORNIA PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION,

JAMES J. JURA, as Administrator,

JOHN S. HERRINGTON, as Secretary of the

DEPARTMENT OF ENERGY OF THE UNITED STATES OF

AMERICA,

and the UNITED STATES OF AMERICA,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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No. 87-1836

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Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

In its Brief in Opposition, the Bonneville Power Administration ("BPA") asserts that adoption of the Near Term Intertie Access Policy ("NTIAP") was consistent with its absolute authority to determine under what conditions utilities in the Pacific Northwest and Canada will be provided access to the Pacific Intertie for the sale of electrical power to California. Such a point of view is squarely at odds with applicable statutes requiring the BPA (1) to submit any change in any schedule previously established for the sale or transmission of electrical power to the Federal Energy Regulatory Commission ("FERC") for confirmation and approval, (2) to provide access to the Pacific Intertie in a fair and nondiscriminatory manner, and (3) to maintain competition to the maximum extent possible. In light of the BPA's refusal to comply with these requirements, and the enormous economic and environmental consequences resulting from such refusal, immediate review by this Court is imperative.

ARGUMENT

The BPA argues, by reference to the opinion below, that the NTIAP was not ratemaking, and thus not subject to review by the FERC, because it "did not impose any charges for power, define any formula for computing charges, or authorize BPA to alter its own charges for power." Opp. at 12 (citing App. at A10-13). The BPA frames the issue too narrowly. As stated by the Ninth Circuit in an earlier case, "A change in the availability provisions of the rate schedules [also] constitutes ratemaking." *Portland General Electric Company v. Johnson*, 754 F.2d 1475, 1481 (9th Cir. 1985).^{*} Moreover, unlike other measures which may have an impact on the BPA's revenues, the NTIAP was specifically intended to increase the price to be charged California. App. at A13, n.2. Thus, by changing the conditions under which access is provided to the Pacific Intertie, the NTIAP affected not only the amount of energy California could purchase from the Pacific Northwest and Canada, but also the price it would be charged. App. A26, n.2. Accordingly, in light of these consequences, the BPA was required by Section 7(k) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839e(k), to submit the NTIAP to the FERC for confirmation and approval. See Pet. at 11.

^{*} The BPA cannot escape this point by arguing, on the basis of *Wisniewski v. United States*, 353 U.S. 901, 902 (1957), that any conflict between the opinion below and *Portland General*, *supra*, would be for the Ninth Circuit, and not this Court, to decide. See Opp. at 11, n.8. In *Wisniewski*, one panel of a Court of Appeals certified to this Court a question previously decided by another panel of that same court. 353 U.S. at 901. In dismissing the certificate, this Court held, "It is *primarily* the task of a Court of Appeals to reconcile its internal difficulties." *Id.* at 902 (emphasis added). But when a Court of Appeals does not reconcile the cases before it, review by this Court may be entirely necessary. That is precisely the situation here. Thus, in the proceeding below, the Ninth Circuit overlooked that the NTIAP effectively changed the "availability provisions" of the BPA's schedules for the transmission of nonfederal power by imposing new restrictions on access to the Pacific Intertie during times not covered by the Exportable Energy Agreement and by assigning to utilities in the Pacific Northwest a higher priority of service than to extraregional utilities. See App. at A12.

The BPA claims unlimited discretion in determining under what conditions it will provide access to the Pacific Intertie. For example, by its reading of the legislative history of Section 6 of the Pacific Northwest Consumer Power Preference Act, 16 U.S.C. § 837e, Congress could not have intended that utilities in Canada be afforded the same access as those in the Pacific Northwest since "BPA would have no incentive to provide *any* service to Canada if, when it did provide service, it had to be on the same terms as that provided to Northwest utilities." Opp. at 15, n.10 (citing H. R. Rep. 590, 88th Cong., 1st Sess. 9 (1963)) (emphasis in original). But why the BPA would be justified in favoring utilities in the Pacific Northwest over those in Canada is not explained. In any case, whatever may be the BPA's justification, the legislative history cited by the BPA quite clearly indicates that, although standing in line behind federal energy and "Canada's entitlement to downstream power benefits," energy generated in Canada "stands on the same basis as any other non-Federal energy." H. R. Rep. No. 590, *supra*, at 9. Moreover, as the statute itself provides,

Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in Section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas.

16 U.S.C. § 837e (emphasis added).

Any doubt that Congress intended such capacity to be provided fairly and without discrimination to utilities in both the Pacific Northwest and Canada is removed by the plain language of Section 6 of the Federal Columbia River Transmission System Act:

The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

16 U.S.C. § 838d. Nonetheless, the BPA argues that “[t]he legislative history shows that the sole purpose of Section 838d was to make clear BPA’s obligation to treat publicly owned utilities and investor-owned utilities alike in granting access to its transmission system.” Opp. at 17 (citing H.R. Rep. 93-1375, 93d Cong., 2d Sess. 5 (1974)). The language of the House Report cited by the BPA is not, however, reasonably susceptible to the inference that equal treatment shall be accorded *solely* to utilities in the Pacific Northwest and not to those in Canada as well. Indeed, the accompanying Senate Report explains that, without exception, all classes of the BPA’s customers shall be treated equally. Sen. Rep. No. 93-1030, 93d Cong., 2d Sess. 10 (1974). Similarly unavailing to the BPA is its reference to the statement in the House Report “‘that Section 6 is not intended to represent a policy having application other than in the Pacific Northwest’” Opp. at 18 (quoting H.R. 93-1375, *supra*, at 5). As the previously-mentioned Senate Report further explains, the obligation to provide nondiscriminatory service applies only to the BPA and not to federal agencies operating elsewhere in the United States: “It is not the Committee’s intention to make an expression of Congressional policy regarding the transmission of energy over Federal systems outside the Pacific Northwest.” Sen. Rep. No. 93-1030, *supra*, at 10. In sum, once its legitimate needs have been met, the BPA is required to transmit energy for any utility in the Pacific Northwest or Canada that can arrange a transaction with California.

The BPA argues that, in adopting the NTIAP, it was not required to maintain competition to the maximum extent possible, but merely to strike “a reasonable balance between antitrust concerns and BPA’s statutory obligation to be fiscally self-supporting.” Opp. at 20-21 (citation omitted). Quite the contrary, the statutes governing the BPA “indicate[] an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.” See *Otter Tail Power Company v. United States*, 410 U.S. 366, 374 (1973). Thus, under Section 2(b) of the Bonneville Project Act, the BPA is directed “to encourage the widest possible diversified use of all electric energy that can be generated and marketed” and “to prevent the monopolization thereof by limited groups.” 16 U.S.C. § 832a(b).

Similarly, Section 5 of the Flood Control Act of 1944 provides that the BPA "shall transmit and dispose of such . . . energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles . . ." 16 U.S.C. § 825s. If these requirements are to have any meaning, the BPA is certainly obliged to do more than merely claim that it considered the anticompetitive aspects of the NTIAP and balanced them against its other responsibilities. Indeed, at no time has the BPA demonstrated why its fiscal needs cannot be met without resort to monopolistic control over the Pacific Intertie. *See* Pet. at 15. Nor has it adequately explained why the exercise of such control is necessary to protect utilities in the Pacific Northwest from competition. *See* App. at A26. Under these circumstances, by failing to scrutinize closely the BPA's development of the NTIAP, the Ninth Circuit wrongly excused the BPA from maintaining competition to the maximum extent possible. *See Gulf States Power Company v. Federal Power Commission*, 411 U.S. 747, 763 (1973).

Finally, the BPA argues that any challenge before this Court to the NTIAP "is, in most respects, now moot" as a result of its adoption of the Long Term Intertie Access Policy ("LTIAP") on May 17, 1988. *Opp.* at 10. To the contrary, however, rather than making any such challenge moot, the BPA's adoption of the LTIAP serves to underscore the importance of immediate review by this Court. In the first place, the LTIAP represents little if any change in the way the BPA provided access to the Pacific Intertie under the NTIAP. Thus, not only will access under Condition 1 still be allocated on the basis of fixed, proportional shares, but Canadian utilities will continue to be excluded except during Condition 3 when they pose no competitive threat. In addition, the experiment proposed to be conducted during Conditions 2 and 3 will likely have little effect on competition in the Pacific Northwest since the BPA plans to reserve for itself as much as two-thirds of the Pacific Intertie's capacity at such times. Moreover, if its argument is now accepted, nothing would apparently stop the BPA from later issuing a new policy and then arguing that challenges to the LTIAP have become moot. In the meantime, of course, the BPA could continue to exert monopolistic control over the interregional market, with consumers

throughout California having to pay several hundred million dollars more each year than they would under a system of open access to the BPA's share of the Pacific Intertie. Such a result would be in direct contravention of the arrangement intended by Congress and must be forestalled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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